LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 12 1967
JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS, PETITIONER,

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1967

CERTIORARI GRANTED OCTOBER 9, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS, PETITIONER,

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Northern District of Indiana, Hammond Division		
Docket entries	1	1
Complaint filed July 2, 1964	5	5
Order and Memorandum of Decision, Eschbach, J., September 30, 1965	8	8
Petition to determine accrued benefits and petition for approval of agreement for attorney fees filed January 10, 1966 and Memorandum	17	17
Agreement for Employment, dated May 12, 1964	23	23
Letter from Bernard Popick, Director, Bureau of Disability Insurance to Raymond Hopkins, dated January 24, 1966	24	24
Order re Attorney Fees, Eschbach, J., March 14, 1966	26	26

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 8, 1967

	Original	Print
Proceedings in the United States Court of Appeals for the Seventh Circuit	29	29
Opinion, Fairchild, J., March 15, 1967	29	29
Judgment, March 15, 1967	37	37
Order denying petition for rehearing en banc, April 21, 1967	38	38

APPENDIX VIII

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION
AT LAFAYETTE

Lafayette Civil #282

RAYMOND HOPKINS

—VS.—

JOHN W. GARDNER, Secretary of Health, Education and Welfare

DOCKET ENTRIES

7-2-64	Complaint filed.
7-6-64	Summons issued and forwarded to U.S. Marshal at South Bend.
7-23-64	Summons returned served on Anthony J. Celebreeze, Secretary of Health, etc.
7-23-64	Summons returned served on Robert F. Kennedy, Attorney General of the United States.
7-23-64	Summons returned served on Ass't U.S. Attorney.
9-3-64	Parties file stip. for exten. of time to and including November 12, 1964, in which the government may file answer to plaintiff's complaint.
9-4-64	So Ordered. (Eschbach: J (Copies to Allen Sharp and A.W. Moellering)

10-12-64	Defendant files answer, together with cert. of service. Transcript filed.
2-18-65	Order for pre-trial conference (June 3, 1965) together with letter to all attorneys and agenda for pre-pre-trial conference mailed to: Allen Sharp and A.W. Moellering.
4-26-65	Motion for summary judgment filed.
4-26-65	Notice of motion for summary judgment filed.
4-26-65	Memorandum in support of defendant's motion for summary judgment filed.
4-26-65	Cert. of service filed re: motion for summary judgment; notice of motion; and memorandum in support of defendant's motion for summary judgment.
5-6-65	Motion for summary judgment filed by plaintiff, together with memorandum in support of plaintiff's motion and notice of motion.
6-3-65	Pre-trial held. Parties given 7 days for supp. briefs.
6-9-65	Plaintiff files supplemental authorities, together with cert. of service.
6-10-65	Defendant files supplemental memorandum of defendant in support of motion for summary judgment, together with proof of service.
6-18-65	Plaintiff files rebuttal memorandum, together with proof of service.
9-1-65	United States files motion for substitution of party defendant, together with cert. of service.
9-13-65	So Ordered. (Eschbach: J (Copies to: Allen Sharp and Alfred W. Moellering)

9-30-65	Order entered reversing the decision of the Secretary of Health, Education and Welfare terminating plaintiff's disability benefits. The Secretary is ordered to allow and pay disability benefits to plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated. The period of disability must include at least the period until the date of the hearing from which this appeal is taken. (SE) Eschbach: J (Copies to Allen Sharp and A.W. Moellering)
11-26-65	United States Attorney files notice of appeal, together with cert. of service.
12-2-65	Plaintiff files affidavit of poverty for leave to defend appeal in forma pauperis.
12-8-65	Order entered granting plaintiff's petition. (SE) Eschbach: J (Copies to: Allen Sharp and A.W. Moellering)
12-28-65	Defendant, Gardner, Secretary of Health, Education and Welfare files motion to dismiss notice of appeal.
12-30-66	Order entered granting motion to dismiss appeal. (SE) Eschbach: J (Copy to Allen Sharp
1-10-66	Plaintiff files petition to determine accrued benefits and petition for approval of agreement for attorney fees, together with cert. of service.
1-31-66	Plaintiff files memorandum regarding petition to determine accrued benefits and petition for approval of agreement for attorney fees, together with cert. of service.
2-1-66	Order entered directing defendant to show cause, if any it has, within thirty (30) days of the date of this Order, why the defendant should not be

ordered to pay to the plaintiff the total amount of back payments of $254.00 per month, beginning with and including January 1963, allowing for any increases or decreases provided for by the Social Security Act, and monthly payments in the future at the same rate provided by law until such time as the plaintiff is found not to be entitled to such payments under the law. (SE) Eschbach: J (Copies to: Allen Sharp; A.W. Moellering)

3-1-66 Defendant files letter referred to as an exhibit in his petition filed 1-10-66, re: accrued benefits and approval of attorney fees, along with explanatory letter of transmittal.

3-14-66 Order entered re: Attorney Fees. (SE) Eschbach: J (Copy to Allen Sharp and U.S. Attorney)

4-19-66 Plaintiff files Notice of Appeal, together with cert. of service.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE
Civil No. 282

RAYMOND HOPKINS, Plaintiff,

—vs.—

ANTHONY J. CELEBREZZE, Secretary of Health, Education and Welfare, Defendant.

COMPLAINT IN ACTION TO SET ASIDE DECISION UNDER SOCIAL SECURITY ACT—Filed July 2, 1964

I

Jurisdiction of this Court is sought under the provisions of Title 42, Section 405(g), United States Code (42 U.S.C.A. §405(g)) and constitutes an appeal from the decision of the Hearing Examiner of the United States Department of Health, Education and Welfare, Social Security Administration, holding that plaintiff is not totally and permanently disabled within the provision of the Social Security Act.

II

This action is commenced within sixty days from the date that plaintiff was notified by the Department of Health, Education and Welfare, in the case of Raymond Hopkins, Claimant and Wage Earner, Social Security Account No. 305-05-2662, inclosing copy of Appeals Council's denial of his request for review of the Referee's decision on plaintiff's claim for a period of disability; said

notice from said Chairman being dated May 6, 1964, in which plaintiff was informed that his review of the Hearing Examiner's decision was denied and stands as the final administrative decision on his claim.

III

Plaintiff alleges that he has exhausted all of his administrative remedies prior to the filing of this appeal.

IV

Plaintiff's denial of request for review to the Office of Appeals Council, Department of Health, Education and Welfare was styled: Raymond Hopkins, Claimant and Wage Earner, Social Security Account No. 305-05-2662, Claim for Period of Disability and denial of request for review of hearing examiner, Jack G. Graham, dated November 27, 1963. The denial of request was dated May 6, 1964.

V

This action is instituted in the District Court of Northern District of Indiana in which the plaintiff resides. The plaintiff resides at RR #2, Williamsport, Warren County, State of Indiana, which is in Warren County, Indiana.

VI

The findings of fact by the Hearing Examiner and Appeals Council are not supported by substantial evidence.

The findings of fact by said hearing examiner and appeals council are contrary to law.

The conclusions of hearing examiner and appeals council are contrary to the facts.

VII

The plaintiff is totally and permanently disabled as a result of:

1. Gastritis and possible gastric ulcer.

2. Duodenal diverticulum.

3. Incisional hernia.

Wherefore, the plaintiff prays for review of the administrative determinations herein or in the alternative for the remand of this case for further consideration and review, and for all other proper relief in the premises.

/s/ ALLEN SHARP
Allen Sharp, Attorney at Law
Williamsport, Indiana
Telephone 762-3442
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins, *Plaintiff*, *vs.* Anthony J. Celebrezze, Secretary of Health, Education, and Welfare, *Defendant.*	Lafayette Civil No. 282.

ORDER AND MEMORANDUM OF DECISION—September 30, 1965

This matter is now before the court for disposition on cross motions for summary judgment filed by the defendant April 26, 1965, and by the plaintiff May 6, 1965. Judgment must be entered in favor of the plaintiff.

This action is an appeal to review the determination of the Hearing Examiner, acting under the authority of the Secretary of Health, Education, and Welfare, that the plaintiff's disability insurance benefits were properly discontinued as of December 31, 1962, under the Social Security Act, 42 U. S. C. §425. Review in this court, authorized by 42 U. S. C. § 405(g), is limited to questions of law involved in the Secretary's determination and to a con-

sideration of whether the Secretary's findings of fact are supported by substantial evidence in the record.

The plaintiff, an operator of power cranes and drag lines, was granted disability insurance benefits under the Social Security Act after he became unable to work on August 26, 1960 at the age of 52. The benefits became effective as of March 1961 and were terminated as of December 1962 on a determination by the Secretary that plaintiff was no longer "disabled" under the provisions of the Act. The termination of benefits was affirmed upon reconsideration. The plaintiff requested a hearing, which was held October 9, 1963. The Hearing Examiner affirmed the prior determination and the Appeals Council denied plaintiff's request for review on May 6, 1964. This timely appeal is taken from determination of the Hearing Examiner, which is also the final decision of the Secretary of Health, Education and Welfare.

The crucial question on review by this court is whether there is substantial evidence to support the finding that plaintiff's disability has ended. "Disability" is defined by the Act as "inability to engage in any substantial gainful activity by reason of any medically determinable physical . . . impairment which can be expected . . . to be of long-continued and indefinite duration." 42 U. S. C. § 423(c)(2). Judge Friendly, writing for the court in *Kerner* v. *Flemming*, 283 F. 2d 916, 921 (2d Cir. 1960), stated the issues involved in a determination of disability under this section:

> "Such a determination requires resolution of two issues—what can applicant do, and what employment opportunities are there for a man who can do only what applicant do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."

In reversing the district court's affirmance of the Secretary's determination in a case similar to the instant case,

Judge Brown, writing for the court in *Butler* v. *Flemming*, 288 F. 2d 591, 595 (5th Cir. 1961), stated that the test of availability of employment within the applicant's competence was whether the evidence on the record contained "any indication of any specific work less exacting (than the work from which he is now foreclosed) within his residual competency and reasonably available as a prospective source of employment in the general area where he lives."

The exhibits at the hearing in the instant case included reports and letters from five doctors who had examined the plaintiff. The reports of two of the doctors were presented to the Department of Health, Education, and Welfare before the plaintiff was declared to be disabled and were the reports of the doctors who were treating the plaintiff as a patient. The reports of the other three doctors were presented after the original award and were made by doctors solely for the purpose of ascertaining whether or not the plaintiff's disability continued. These reports establish that the plaintiff became disabled by reason of a ventral hernia resulting from a gall bladder operation. Four attempts were made to repair the hernia, which is about the size of a human fist. An examination in February 1963 revealed that it exuded a "serum" that was apparently of superficial origin. In December 1963, Dr. Nelson stated that further attempts to repair the hernia would probably be futile and that improvement was unlikely. The Plaintiff has other physical difficulties, including almost complete blindness in his left eye.

The plaintiff has worked as a power crane or drag line operator in strip mines all his life except at one earlier time when he did some farm work. Plaintiff's testimony that he is unable to do farm work in his present condition is uncontradicted in the record. He has a seventh grade education and can read, write, and do simple arithmetic, although plaintiff testified he is not very good at arith-

metic. Joseph Ganns, a vocational rehabilitation expert, testified at the hearing that the plaintiff is "limited in transfer of skills."

While the general burden of proving disability is upon the applicant, he is not required to "go down the list and verbally negative his capacity for each (industrial occupation) or their availability to him as an actual opportunity for employment." *Butler* v. *Flemming, supra,* at 595. The record in the instant case contains evidence of the possibility of plaintiff finding employment in only three job areas. This does not include farming, which the record indicates without contradiction is not within applicant's competency. The plaintiff, according to Mr. Gann's evaluation, might be able to work as a truck driver or, if the medical conclusions of Dr. Levin are correct, at his former job as a crane operator if the lever controls are powered by more modern methods of electricity or air. The Hearing Examiner seemed to consider that plaintiff might also be able to drive a taxi, although Mr. Ganns declined to endorse that proposition.

Mr. Ganns' testimony that plaintiff might be able to drive a truck is not based on plaintiff's physical capabilities, but on a study of the transferability of skills of a person who has formerly been a crane operator. There is no evidence in the record that plaintiff is physically capable of driving a truck or a taxi. Likewise, there is no evidence that any such employment opportunities are reasonably available to a person with an unrepairable hernia as serious as that suffered by this plaintiff. Such jobs are generally accompanied by the lifting of the truck's cargo or the luggage of taxi passengers, the opening of taxi doors that requires much awkward reaching, and other physical exertions beyond the competency of this plaintiff. The Hearing Examiner cannot stretch inferences so far that evidence of transferability of skills can support a conclusion of

physical competency. There was no evidence that a transferability of skills exists from operating a crane to driving a taxi.

Nor is this court favorably impressed, to put it mildly, with the reasonableness of suggesting that a man who is blind in one eye should be asked, or even allowed, to seek employment as a truck driver or a taxi driver. There certainly is no evidence in this record to indicate that such a man is reasonably likely to find an employer willing to hire him as a truck or taxi driver. The vision requirements for obtaining a public passenger chauffeur's license from the State of Indiana almost certainly could not be met by a one-eyed man. The court finds that there is no evidence whatsoever to support the Hearing Examiner's finding that plaintiff has any practical opportunity to find employment driving a truck or a taxi.

If the Hearing Examiner's determination is to stand, it must rest on the reasonable availability to the plaintiff of employment in his former line of work. The Examiner's conclusion that such employment is available and within plaintiff's competency must rest upon the reports of Dr. Stanley Levin, an expert in internal medicine, and upon the testimony of Mr. Ganns. The record contains no other evidence to support such a conclusion.

It is significant that Dr. Levin nowhere states in his reports that plaintiff is capable of engaging in his former regular work. He does say it is his opinion that plaintiff can operate a crane, but only "if heavy exertion is not required to move the levers." The only evidence on the amount of exertion required is plaintiff's statement that pulling levers on a crane involved much more physical effort than shifting gears in a car, and the testimony of Mr. Ganns that operating levers in a "modern" crane required no more than fifteen pounds of arm pressure. The fact that plaintiff can operate an automobile gear shift

for short trips to town and back, or even that he is capable of pushing and pulling the levers on a "modern" crane does not support a finding that he can operate a crane. There is no evidence in the record indicating the capacity of plaintiff's arm pressure unless it is Dr. Levin's report that plaintiff cannot lift anything weighing more than five or six pounds. There is no evidence that Dr. Levin had ever moved the lever of a power crane or knew how much pressure was required to move one, and his opinion that plaintiff should be able to "operate levers" is not a substantial basis for the Examiner's conclusion that plaintiff was physically capable of operating the levers of a power crane as a full-time occupation. "Satisfaction of the claimant's statutory obligation to show that he is not able to do any substantial work is to be judged in a practical way." *Ratliff* v. *Celebrezze,* 338 F. 2d 978, 983 (6th Cir. 1964); *Kerner* v. *Flemming, supra.* The test for determining an applicant's competency and the availability of work, as stated by Judge Sobeloff, requires that the availability and the nature of the work be judged "in the light of what is reasonable and not of what is merely conceivable." *Thomas* v. *Celebrezze,* 331 F. 2d 541, 546 (4th Cir. 1964). On this record there is no evidence that plaintiff can reasonably work a power shovel on a full-time basis, or that there is any practical likelihood that he could find an employer willing to hire someone with all of plaintiff's physical limitations.

Dr. Levin reported that plaintiff "will not be able to do any bending beyond that ordinarily associated with sedentary occupation." The Examiner himself conceded at the hearing that a crane operator has to do some bending. Plaintiff's testimony is unchallenged that the lifting of cables is sometimes involved and that there are times when a crane operator may have to climb around on the machine to do repair work. Such activities are admittedly beyond

plaintiff's physical competency. Dr. Levin reported that plaintiff could not do climbing "which would require a moderate amount of strain." The Hearing Examiner suggested that plaintiff could use a ladder to climb the eight feet up to the crane once in the morning, and down again at night, as a means of circumventing plaintiff's lack of ability to climb onto the crane in the ordinary way. Neither the plaintiff nor Mr. Ganns had any idea whether an employer would object to the inconvenience that would be caused by such a method. Plaintiff agreed that he might be able to work levers and that he could climb up and down the proposed ladder once a day, but protested that there was much more to the job than those two operations. His testimony about the nature and details of the work is unchallenged throughout the entire record. A work activity report filed by a claims representative for the Secretary, and which is one of the exhibits in the record, describes plaintiff's inability to lift anything or to be "climbing around shovel and rig" as factors that have an effect on the quality of plaintiff's work as a crane operator. The same report stated that plaintiff "had to use hands and feet to control levers and operate shovels (diesel and compressed air) for controls and brakes." Mr. Ganns' testimony that plaintiff could "probably" operate the levers on "modern cranes" and climb up and down once a day and that plaintiff's ability to operate the levers depended on the body position is too speculative to support a finding that the plaintiff could reasonably and practically find and engage in work of this nature in view of his physical limitations. "There must be something more tangible establishing what employment opportunities there are for a man with his impairment." *Stancavage* v. *Celebrezze*, 323 F. 2d 373, 378 (3d Cir. 1963). "A theoretical ability to so engage is not enough if no reasonable opportunity is available." *Celebrezze* v. *Warren*, 339 F. 2d 833 (10th Cir. 1964).

The Hearing Examiner's question about the number of existing jobs for crane operators, directed to Mr. Ganns, was deliberately phrased to exclude any inquiry as to the practical availability of employment of crane operators in the construction industry for men with plaintiff's physical limitations. Mr. Ganns' answer, "Oh, yes, a lot of construction work is going on," casts no light on the availability of job opportunities for this plaintiff. "Since the abstract 'average' man is not the standard to be used, *Pearman* v. *Ribicoff*, 307 F. 2d 573 (4th Cir. 1962), there must be evidence to show the reasonable availability of jobs which this particular claimant is capable of performing." *Cyrus* v. *Celebrezze*, 341 F. 2d 192, 196-197 (4th Cir. 1965); *Ray* v. *Celebreeze*, 340 F. 2d 556 (4th Cir. 1965).

The evaluation by Judge Sobeloff of a case similar to the instant case is applicable here:

> "Employers are concerned with substantial capacity, psychological stability, and steady attendance; they will not unduly risk increasing their health and liability insurance costs. It is unrealistic to think that they would hire anyone with the impairment of this claimant." *Thomas* v. *Celebrezze, supra* at 546.

Plaintiff urges that the rejection of plaintiff's application for vocational rehabilitation by the Bureau of Old-Age and Survivors Insurance, the same bureau which terminated his disability benefits, should bind the Secretary in his determination of plaintiff's disability. The rejection was based on a determination by the Indiana Vocational Rehabilitation Division on March 28, 1963 that plaintiff's "impairment (was) too severe." This court does not need to reach that point in view of the findings above. The situation, however, poignantly illustrates the dilemma of a person considered by the same agency of government to be too disabled to learn a new job, yet not disabled enough to be entitled to his Social Security insurance benefits.

This court finds that there is no substantial evidence in the record to support the Secretary's finding that plaintiff's disability terminated as of December, 1962. There is abundant evidence in the record to establish that plaintiff is disabled within the meaning of the Act and the cases, even if such a conclusion were based solely on the reports and testimony upon which the Secretary sought to base his contrary conclusion. There is no apparent reason to remand the case or give the Secretary further opportunity to take testimony, and no such request has been made. The litigation has already consumed more than two and one-half years since plaintiff's benefits were terminated. *Cyrus* v. *Celebrezze, supra*; *Ratliff* v. *Celebrezze, supra.*

The decision of the Secretary of Health, Education, and Welfare terminating plaintiff's disability benefits as of December, 1962 is reversed. The Secretary is ordered to allow and pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated. The period of disability must include at least the period until the date of the hearing from which this appeal is taken.

Entered this 30th day of September, 1965.

JESSE E. ESCHBACH,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT.

PETITION TO DETERMINE ACCRUED BENEFITS AND PETITION FOR APPROVAL OF AGREEMENT FOR ATTORNEY FEES—Filed January 10, 1966

Raymond Hopkins, being first duly sworn upon his oath, respectfully represents to the Court as follows:

1. That heretofore on the 30th day of September, 1965, this Court entered its judgment in this case which judgment is hereby incorporated herein by reference.

The Court's particular attention is now directed to the following sentence of the Court's judgment, to-wit:

> "The Secretary is ordered to allow and pay disability benefits to the Plaintiff from the time of their termination until such time as a new determination is made that the Plaintiff's disability has, in fact, terminated."

2. That a notice of appeal was filed by the Defendant in this case on or about the 26th day of November, 1965, which notice of appeal was dismissed by the order of this Court on the 30th day of December, 1965.

3. That as shown at page 85 of the transcript originally filed in this cause at the time said benefits were terminated on the 31st day of December, 1962, Raymond Hopkins and Verna B. Hopkins, his wife, were receiving a monthly benefit in the sum of One Hundred Sixty-One Dollars and Forty Cents ($161.40) and there was an additional sum of $92.80 payable for the minor children of Raymond Hopkins and Verna B. Hopkins. That the total benefits paid and payable at the said time were Two Hundred Fifty-four Dollars ($254.00) per month. That as

shown by said determination of award at page 85 of said transcript, which determination was dated September 13, 1961 and approved September 14, 1961, the primary amount was in the sum of One Hundred Fifteen Dollars ($115.00). That effective January 1, 1965 there was a seven per cent (7%) increase in said benefits and the primary amount in this case would have been adjusted to approximately One Hundred Twenty-three Dollars ($123.00). That on the basis of the above and foregoing determination it is believed by the undersigned that between January 1, 1963 and the present time the undersigned claimant would be entitled to at least thirty-six (36) months of benefits at Two Hundred Fifty-four Dollars ($254.00) per month or a total of Nine Thousand One Hundred Forty-four Dollars ($9,144.00). In addition to this there would be a seven per cent (7%) increase for benefits accruing after January 1, 1965.

4. That on this 6th day of January, 1966, the Attorney for the undersigned claimant, namely, Allen Sharp, Williamsport, Indiana, conferred with the Deputy United States Attorney for the Northern District of Indiana, namely, Mr. Joseph F. Eichhorn, with reference to the amount of accrued unpaid and past due benefits payable pursuant to the order and judgment of this Court entered September 30, 1965. Said Mr. Joseph F. Eichhorn related to said Allen Sharp that on the basis of a communication from the office of the Attorney General of the United States that the Defendant Secretary of Health, Education and Welfare would pay the sum of Three Thousand Seven Hundred Forty-four Dollars and Eighty Cents ($3,744.80) as accrued past due and unpaid benefits in this case.

That in the month of December, 1965, representatives of the Defendant Secretary of Health, Education and Welfare, Social Security Administration Office, Danville, Illinois, requested of the undersigned claimant certain information with reference to his income and his condition since January 1, 1963. That the undersigned provided all requested information. That in substance the information

provided was to the effect that since January 1, 1963 the undersigned has earned no income and that his wife has earned no income and that his minor children have earned no income and that his physical situation with reference to disability has remained the same.

That the indicated determination of unpaid and accrued benefits by the Defendant Secretary of Health, Education and Welfare is not consistent with the order and judgment of this Court heretofore entered herein. That the Defendant Secretary should be ordered to pay disability benefits from January 1, 1963 until the present time. That there has not been a new determination that the Plaintiff's disability has, in fact, been terminated.

5. That at the time the undersigned Plaintiff engaged the legal services of Allen Sharp a written contract and agreement with reference to said services was entered into, the same being dated May 12, 1964, a copy of which agreement is attached hereto and incorporated herein by reference. That prior to the preparation and execution of said agreement the said Allen Sharp carefully examined certain court decisions with reference to attorney fees in such proceedings as these. In particular he examined the case of *Sheppard* v. *Flemming,* 189 F. Supp. 571; and *Sparks* v. *Celebrezze,* 228 F. Supp. 508. That this agreement was entered into and signed openly and freely by both parties prior to the enactment and effective date of Public Law 89-97, the effective date of which was July 30, 1965. Said Public Law 89-97 is found in Title 42, United States Code Annotated, 1965 Cumulative Annual Pocket Part at Section 406(b)(1).

That pursuant to said employment agreement said Allen Sharp has rendered efficient and faithful service, has advanced the sums for filing fee and other costs in this action, has made numerous trips to Lafayette, Indiana, has made numerous long distance calls to both the Social Security Administration Office in Danville, Illinois, to the Clerk of the U. S. District Court at Lafayatte, Indiana and to

the office of the United States Attorney in Fort Wayne, Indiana. That said Attorney has carefully examined the transcript in this case, has prepared numerous and extensive memorandum of law in this case, has spent many days in research in preparing memoranda and briefs. That subsequent to the filing of the notice of appeal by the Defendant in this case on November 26, 1965, said attorney spent one full day in the Library of the Chicago Bar Association examining briefs and records of appeal and other similar cases. That the undersigned believes that said fee agreement was fair at the time it was entered into and believes that it is fair now. That the undersigned prays the Court for an order approving said fee agreement.

Wherefore, the undersigned prays the Court for an order determining the amount of unpaid accrued disability benefits pursuant to the judgment and order of this Court entered September 30, 1965 and approving the agreement for employment and attorney fees entered into on the 12th day of May, 1964.

/s/ Raymond Hopkins.

MEMORANDUM.

The record speaks for itself with reference to the determination of benefits payable under the Court's order.

With reference to the matters of attorney fees the undersigned Attorney carefully examined the decisions with reference to the same at the time the employment agreement was entered into. At that time the court decisions were to the effect that a contingent fee contract could be entered into with reference to disability proceedings in United States District Courts.

There was no regulation as to the amount of fees at that time. In fact, in the case of *Sheppard* v. *Flemming*, 189 F. Supp. 571, which is cited with approval in *Cistalle* v. *Secretary of Health, Education and Welfare*, 238 F. Supp. 340 (1965) Western District of Louisiana, a contingent fee contract similar to the present one was approved. The undersigned attorney does not intend to violate the provisions of Public Law 89-97 which was effective July 30, 1965. Therefore, we desire the matter of attorney fees to be completely before the Court and would request the Court to approve the agreement of the parties if the Court is persuaded, as we are, that the limitation placed in Public Law 89-97 does not apply to an agreement made in good faith and openly and in accord with court decisions prior to the effective date of that Act.

Certainly we will abide any decision the Court makes in this regard.

We are also prepared to submit expert evidence to the Court with reference to the reasonable value of attorney fees should the Court desire to receive the same.

Respectfully submitted,

/s/ Allen Sharp.

Certificate of Service.

The undersigned certifies that on this 7th day of January, 1966, he deposited in the United States Mail at Williamsport, Indiana, postpage prepaid, a copy of the above and foregoing document properly addressed to Joseph F. Eichhorn, United States Attorney, Fort Wayne, Indiana.

/s/ Allen Sharp,
Attorney at Law,
Williamsport, Indiana,
Attorney for Plaintiff.

State of Indiana,
County of Warren, *ss.*

The above Petition was subscribed and sworn to before me, a Notary Public in and for said County and State, on this 7th day of January, 1966.

/s/ Allen Sharp,
Notary Public.

(Seal)

My Commission Expires April 9, 1966.

AGREEMENT FOR EMPLOYMENT—May 12, 1964

This memorandum of agreement made and entered into between Raymond Hopkins and Verna B. Hopkins, husband and wife, of Warren County, Indiana, First Parties, and Allen Sharp of Williamsport, Indiana, Second Party, Witnesseth that

Whereas the first party Raymond Hopkins has a disability claim now pending with the Social Security Administration and desires to pursue the same in court,

Whereas, Allen Sharp is an Attorney at Law, duly licensed to practice law in the State of Indiana,

Now, Therefore, it is agreed between the parties hereto as follows:

1. That the First Parties agree to employ the Second Party as Attorney to pursue this claim in the United States District Court and the United States Court of Appeals, if necessary. Said Attorney shall be compensated on the following basis:

a. In the event an award is awarded by decision of the United States District Court the Second Party shall be paid an amount equal to forty per cent (40%) of the benefits accrued from January 1, 1963 to the date of said award.

b. In event it is necessary to appeal to the United States Court of Appeals, said Second Party shall be paid an amount equal to fifty per cent (50%) of the benefits from January 1, 1963 to the date of said award.

c. That the Second Party agrees to use his best professional abilities and to give his best professional time to this claim.

In Witness Whereof, the Parties have hereunto set their hands and seals at Williamsport, Indiana, on this 12th day of May, 1964.

Raymond Hopkins, (Seal)
Verna B. Hopkins, (Seal)
First Parties,
Allen Sharp. (Seal)

APPENDIX V

14:PC7:PSA
305-85-2662-11A32, HC 3, 2

District Office,
Danville, Illinois,

January 24, 1966.

Mr. Raymond Hopkins,
Rural Route 2,
Williamsport, Indiana 47993,

Dear Mr. Hopkins:

We are writing about your claim for social security benefits.

It has been determined that you are still disabled. Therefore, you and your family will continue to receive benefit payments.

This action supersedes our previous determination and is in accordance with the decision of the United States District Court. If your condition improves or there is a change in your work status, however, you must notify us immediately.

Based on the recent amendments to the Social Security Act, you are entitled to receive $123.10. Your wife and the two children are each entitled to receive $51.50. These new monthly rates are effective beginning January 1965.

Section 206(b)(1) of the Social Security Act provides that our attorney may ask the court to approve a fee not to exceed 25 percent of past-benefits due you. We are, therefore, withholding the amount of $936.20, which represents 25 percent of your past-due benefits of $3,744.00 pending action by the court on the amount of the attorney fee. The amount withheld will be applied against the fee set by the court and will be mailed directly to your attorney; any remaining amount will be sent to you.

Benefit payments for you and your wife will continue to be combined. The next husband-wife check will be for $5,032.60. This represents payment for January 1963 through December 1965. You will receive this check within a few days. After that, the regular monthly check for $174.60 will be sent shortly after the month for which it is payable.

The children's check for the period of January 1963 through December 1963, in the amount of $3,463.50, will be sent to you shortly. After that, their monthly, regular check for $103.00 will be sent to you as usual.

If you have any questions with regard to your claim, you should get in touch with the district office shown on this notice. If you call in person, please take this notice with you.

Sincerely yours,

Bernard Popick,
Director, Bureau of Disability Insurance.

cc: Allen Sharp,
Attorney-at-Law.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins,
Plaintiff,
vs.
John W. Gardner, Secretary of Health, Education and Welfare,
Defendant.

Lafayette Civil No. 282.

ORDER—March 14, 1966

Pursuant to the order of this court, entered February 1, 1966, the defendant has filed a memorandum showing the defendant's full compliance with the order of this court entered September 30, 1965. The plaintiff's memorandum, which was filed on January 31, 1966, but which did not come to the court's attention until after its order was filed on February 1, 1966, the following day, indicates that the plaintiff is entirely satisfied with the defendant's compliance. There remains only the question of a determination and certification of the amount of attorney's fees allowable to the plaintiff's counsel under § 206(b)(1) of the Social Security Act as Amended (Section 332 of P. L. 89-97), 42 U. S. C. A. § 406(b)(1) (Supp. 1965).

The plaintiff and his attorney entered into a contingent fee contract pertaining to this litigation. That contract was executed and this action was filed before the Social Security Act was amended to provide for the court's determination of counsel fee. However, the words of the statute provide for such determination "whenever a court renders a judgment favorable to a claimant" in a case of this nature. 42 U. S. C. A. § 406(b)(1) (Supp. 1965). It was apparently the intent of Congress to have such attorney's fees determined by the court in all appropriate judgments rendered by the court, not just in judgments entered in cases filed or relating to contracts executed subsequent to the effective date of the amendment to 42 U. S. C. § 406. Such legislation is unquestionably valid. *Fleming* v. *Rhodes*, 331 U. S. 100, 67 S. Ct. 1140 (1947); *Calhoun* v. *Massie*, 253 U. S. 170, 40 S. Ct. 474 (1920). United States district courts had validly exercised such power even before the congressional enactment of express authorization to determine attorney's fees. *Celebrezze* v. *Sparks*, 342 F. 2d 286 (5th Cir. 1965) affirming *Sparks* v. *Celebrezze*, 228 F. Supp. 508 (E. D. Texas 1964); and *Folsum* v. *McDonald*, 237 F. 2d 380 (4th Cir. 1956). The plaintiff's attorney himself has represented to this court that he was familiar with the decisions in the two *Sparks* cases, *supra*.

From the evidence in the record of this case, it is impossible for this court to determine the exact dollar amount of past-due benefits to which the plaintiff, Raymond Hopkins, himself is entitled from January 1963, the date of the termination of his benefits, until September 30, 1965, the date of the judgment of this case. This court therefore determines that the amount of attorney's fees to which the plaintiff's attorney is entitled is twenty-five per cent (25%) of the amount of those past-due benefits.

Accordingly, this matter having come before the court

pursuant to the petition of plaintiff's attorney for approval and allowance of a fee for representation before this court pursuant to Section 206(b)(1) of the Social Security Act as Amended (Section 332 of P. L. 89-97), it is ordered that a fee is hereby awarded to the attorney for the plaintiff in this proceeding in the amount of twenty-five per cent (25%) of the payment due to the plaintiff, Raymond Hopkins, from January 1, 1963 through September 30, 1965, which amount shall be certified by the defendant for payment by the Secretary of the Treasury directly to the attorney, Allen Sharp.

Entered this 14th day of March, 1966.

JESSE E. ESCHBACH,
United States District Judge.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1966—January Session, 1967.

No. 15724

RAYMOND HOPKINS,
Plaintiff-Appellant,

vs.

JOHN W. GARDNER, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

OPINION—March 15, 1967

Before HASTINGS, *Chief Judge,* and FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This appeal, brought in reality by attorney Allen Sharp, involves Sharp's claim that the district court erroneously limited his fee for services in an action to review an administrative decision suspending insurance benefits under the social security act. The problem is the construction of a statute, enacted in 1965, authorizing the court to allow a reasonable attorney's fee where, in such action, a judgment favorable to a claimant is recovered, the fee not to be "in excess of 25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of such judgment.'"[1]

The secretary contends that the statute applies to all judgments entered after the statute was enacted, and that the 25 percent maximum must be computed upon the total of the past-due benefits to which plaintiff was individually entitled. Sharp contends that the statute was not intended to apply in a case where the fee had been agreed upon before the statute was enacted, but that if it be applicable, the 25 percent is to be computed upon an amount which includes the past-due benefits to which plaintiff's wife and children were entitled, as well as plaintiff's own.

In 1961 and 1962, Raymond Hopkins was receiving disability insurance benefits under the social security act, and his wife and children were receiving the benefits provided by the act for the wife and dependent children of an individual entitled to disability insurance benefits. Late in 1962 the department notified Hopkins that it considered him able to do substantial gainful work and that December, 1962, would be the last month for which he and his wife and children would be entitled to benefits. Hopkins exhausted his administrative remedies, but the final decision was that his benefits had been properly terminated.

Hopkins brought this action to review. His wife and children were not named in either the proceedings for administrative review or as plaintiffs in this action. On September 30, 1965, the district court reversed the secretary's decision and ordered him to "pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated."

On January 24, 1966, the department wrote Hopkins that because it had been decided that Hopkins was still

1. 42 U. S. C. A. § 406(b)(1), Public Law 89-97, July 30, 1965.

disabled "you and your family will continue to receive benefit payments." Hopkins' individual past-due benefits through December, 1965, totalled $3,744.80, his wife's benefits $1,287.80, and the children's $3,463.50.

The district court awarded Sharp a fee of 25 percent of the past-due benefits payable to Hopkins individually, up to September 30, 1965, the date of the judgment.

The statute to be construed is as follows:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph."[2]

Paragraph (b) (2), enacted at the same time, makes it a misdemeanor to charge for services in connection with proceedings to which paragraph (1) is applicable any amount in excess of that allowed by the court.

1. *Application to the instant case.* Sharp and Mr. and Mrs. Hopkins signed a contract in May, 1964, in which the Hopkins employed Sharp to pursue the disability claim in court and fixed Sharp's compensation at 40 percent of the benefits accrued if awarded by the district court, without appeal, and 50 percent if it became

2. 42 U. S. C. A. § 406(b)(1), Public Law 89-97, July 30, 1965.

necessary to appeal. The complaint was filed July 2, 1964. The statute was enacted July 30, 1965. Most of the services had been rendered before that date. Judgment was rendered September 30, 1965.

Mr. Sharp relies on the rule of construction that "a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."[3] The judgment was rendered, however, after the statute was enacted, and the statute says "Whenever a court renders a judgment. . . ." Strictly speaking, application of this statute to a judgment rendered after its enactment is not retrospective. The retrospective impact results from the fact that this action was begun before the enactment, and that plaintiff and the attorney had agreed upon a fee before that. The same will be true with respect to many judgments rendered after enactment, though the proportion of time elapsed and services rendered before and after the enactment will vary widely. The difficulty of formulating any exception of already pending cases which would still serve the purpose Congress had in mind suggests that it was a deliberate choice to apply the new rule to all cases not yet terminated.

The report of a senate committee makes it plain that Congress was concerned about the charging of inordinately large fees, usually resulting from a contingent fee arrangement,[4] and it seems a very reasonable choice to make the remedy apply to all pending cases.

---

3. 2 Sutherland, Statutory Construction 115 (3rd ed. 1943).

4. "It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of

The fourth circuit has held the statute applicable where judgment was entered after the enactment, notwithstanding the existence of a prior fee contract.[5]

We find no basis for any construction which would exempt the allowance of fee in the instant case from the application of the statute.

2. *The base upon which the 25 percent maximum is to be computed.* Mr. Sharp points out that although the past-due benefits for Raymond Hopkins individually, accrued to the end of 1965 (something less at date of judgment) were some $3,700, the judgment also determined, in actual though incidental, effect, that Mrs. Hopkins and the children were entitled to benefits, so that some $8,000 were the real total amount recovered for the Hopkins family as a result of Sharp's efforts. He contends that the 25 percent limitation should be computed upon the larger figure.

The key word is "claimant," as used in sec. 406 (b) (1). That statute operates "whenever a court renders a judgment favorable to a claimant," the claimant must have been "represented before the court by an attorney," and the maximum limit of attorney's fees is measured by a percentage of the benefits "to which the claimant is entitled by reason of such judgment." The word "claimant" is found in the preceding subs. (a), which deals with

---

the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

"The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 percent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. . . ." S. Rep. No. 404, 89th Cong., 1st Sess. 422 (1965), U. S. Code Cong. & Admin. News 1965, p. 2062.

5. *Lambert* v. *Celebrezze* (4th Cir. 1966), 361 F. 2d 677, 679; *Redden* v. *Celebrezze* (4th Cir. 1966), 361 F. 2d 815, 816.

representation of claimants in administrative proceedings before the secretary.

Mr. Sharp would contend that "claimant" may be read in the plural and includes those whose right to what may be termed derivative benefits is established by the judgment in favor of one found to be entitled to what may be termed primary benefits. If Mr. Hopkins is the only "claimant," the district court correctly limited the fee to 25 percent of the past-due benefits accrued to him. If his wife and children are also "claimants," the district court might have allowed a larger fee, but not in excess of 25 percent of the past-due benefits accrued to all.

Under a strict construction of the words in the statute, no one could be a "claimant . . . who was represented before the court by an attorney" unless he were a plaintiff in the action. Here, the only plaintiff was Hopkins.

But while such construction would exclude the wife and children from the category of "claimant" in this case, because they were not plaintiffs, and hence would exclude their past-due benefits from the base on which the maximum attorney's fee would be computed, it would make the result depend on a procedural detail. Here the administrative decision under review terminated the payment of benefits to all four in the Hopkins family upon the single ground that Hopkins was no longer entitled, and all could have joined as plaintiffs. In many cases, although each beneficiary must make a separate application, it would be possible to make such application and have each applicant become a plaintiff in an action to review the administrative denials. It does not seem satisfactory, therefore, to rest our decision upon the proposition that a beneficiary is not a "claimant" unless he is a "plaintiff."

In broader terms, the question is whether "claimant"

under this statute includes all persons whose entitlement to benefits is established by the resolution of the issue before the court, in this case, Mr. Hopkins' disability, or whether "claimant" as used in the statute means only the applicant for primary benefits in any case where his entitlement is the issue.[6]

The fourth circuit has adopted the first construction, holding that "the statutory words 'past-due benefits to which the claimant is entitled by reason of such judgment' mean the entire group of benefits payable to the primary claimant on his own behalf and to him and other dependent members of his family on their behalf."[7]

We, however, with all respect to our brethren of the fourth circuit, choose the latter construction. We do so because it more closely limits fees, and such was the concern of Congress in enacting the statute. It also seems probable that those who drafted the statute assumed that where the dispute was over the entitlement of the individual applying for primary benefits, only he, and not those who would be entitled to derivative benefits, would appear as claimant before the secretary or as plaintiff before the court. The words they chose should be interpreted accordingly even though, as previously pointed out, it may be possible to have all interested beneficiaries formally pursue the administrative remedy and seek judicial review as plaintiffs. Furthermore, although "the time and labor required, the novelty and difficulty of the questions involved and the skill requisite

6. Even under the latter alternative, an applicant for derivative benefits would be deemed a "claimant" under some circumstances. For example the issue might be whether an applicant was as she claimed to be, the wife of an individual who was entitled to primary benefits.

7. *Redden* v. *Celebrezze, Lambert* v. *Celebrezze* (4th Cir. 1966), 370 F. 2d 373, 375, aff'g on rehearing *en banc* 361 F. 2d 815 and 361 F. 2d 677.

properly to conduct the cause" make up but one of the elements thought proper in determining a lawyer's fee,[8] this element is no greater in presenting an action to review denial of benefits to an applicant who is single and without dependents, than in presenting the same issues in an action where the applicant has a wife and children. We think it unlikely that Congress intended that in a case like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single.

We consider the district court reached the correct decision, and the order appealed from is

AFFIRMED.

8. The others are: "(2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. . . ." ABA Canons of Professional Ethics No. 12.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wednesday, March 15, 1967

Before Hon. JOHN S. HASTINGS, Chief Judge; Hon. THOMAS E. FAIRCHILD, Circuit Judge; Hon. WALTER J. CUMMINGS, JR., Circuit Judge.

No. 15724

RAYMOND HOPKINS, Plaintiff-Appellant,

vs.

JOHN W. GARDNER, Secretary of Health, Education and Welfare, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUDGMENT—March 15, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Friday, April 21, 1967.

Before:

Hon. John S. Hastings, *Chief Judge,*
Hon. Elmer J. Schnackenberg, *Circuit Judge,*
Hon. Win G. Knoch, *Circuit Judge,*
Hon. Latham Castle, *Circuit Judge,*
Hon. Roger J. Kiley, *Circuit Judge,*
Hon. Luther M. Swygert, *Circuit Judge,*
Hon. Thomas E. Fairchild, *Circuit Judge,*
Hon. Walter J. Cummings, Jr., *Circuit Judge.*

Raymond Hopkins,
Plaintiff-Appellant,
vs.
No. 15724
John W. Gardner, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

FILED
JUN 21 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 276

RAYMOND HOPKINS,

Petitioner,

vs.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALLEN SHARP,
SAM W. LITZENBERGER, JR.,
115 North Monroe Street,
Williamsport, Indiana 47993,
Attorneys for Petitioner.

June 21, 1967.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement	3
Reasons for Granting Writ	7
Conclusion	7
Appendices	
Appendix A. Opinion of District Court, N. D. Ind.	1a
Appendix B. Later Opinion of District Court, N. D. Ind.	10a
Appendix C. Opinion of the Court of Appeals, Seventh Circuit	13a
Appendix D. Order Denying Rehearing, Court of Appeals for Seventh Circuit	21a

CITATIONS.

Cases.

Blankenship v. Gardner (U. S. D. C. W. D. Va. 1966), 256 F. Supp. 405	6
Lambert v. Celebrezze, 361 F. 2d 815 (4th Cir. 1966), rehearing 370 F. 2d 373	3, 6, 19a
Miracle v. Celebrezze, 351 F. 2d 361 (6th Cir. 1966)	7
Redden v. Celebrezze, 361 F. 2d 815 (4th Cir. 1966), rehearing 370 F. 2d 373	3, 6, 19a
Sims v. Gardner (U. S. D. C. E. D. Tenn. 1966), 255 F. Supp. 825 on appeal to Court of Appeals for Sixth Circuit No. 17356 pending	7

Statutes.

Social Security Act, 49 Stat. 623 as amended, 42 U. S. C. 401 et seq.: Section 206(b)(1), 42 U. S. C. 406(b)(1) 2, 4, 6, 10a, 12a, 15a

Section 205(g), 42 U. S. C. 405(g) 5, 1a

28 U. S. C. Sec. 1254(1) 2

Miscellaneous.

S. Rep. 404, 89th Cong. 1st Sess. 422 ..... 4, 17a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. .....

RAYMOND HOPKINS,

Petitioner,

vs.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Raymond Hopkins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the case of Raymond Hopkins *vs.* John W. Gardner as Secretary of Health, Education and Welfare, No. 15724 in that Court on March 15 1967.

OPINIONS BELOW.

The opinion of the District Court is unreported and appears as Appendix A at p. 1a. A subsequent opinion of the District Court (the relevant one here) dated March 14, 1966, is unreported and appears as Appendix B at p.

10a. The opinion of the Court of Appeals for the Seventh Circuit has been reported at 374 F. 2d 726 and is Appendix C at p. 13a.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered March 15, 1966. A timely motion for rehearing was denied April 21, 1967. (See Appendix D at p. 21a.) A stay of the issuance of the mandate of the Court of Appeals has been granted by that Court, conditioned on the filing of a petition for certiorari by June 22, 1967. This Court's jurisdiction is invoked under 28 U. S. C. Sec. 1254(1). The basis of the jurisdiction of the District Court was 42 U. S. C. 406(b)(1) and 42 U. S. C. Sec. 405(g).

QUESTIONS PRESENTED.

The amount of attorney fees allowable to a claimant's attorney by the District Court under 42 U. S. C. 406(b)(1) as amended by Section 332 of the Social Security Amendments of 1965, 79 Stat. 403; whether such fee should be based on the benefits of the claimant alone or on the benefits of the claimant and the other dependent members of his family.

STATUTORY PROVISION INVOLVED.

Section 206(b)(1) of the Social Security Act, 42 U. S. C. 406(b)(1) as amended by Section 332 of the Social Security Amendments of 1965, 79 Stat. 403 which provides in pertinent part:

> "(b)(1) Whenever a court renders a judgment favorable to a claimant under this sub-chapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to

which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment of such representation except as provided in this paragraph."

STATEMENT.

This case commenced in the District Court on July 2, 1964 as an appeal to reverse the decision of the Secretary of Health, Education and Welfare that Raymond Hopkins was not totally and permanently disabled within the provisions of the Social Security Act. The District Court reversed the Secretary on September 30, 1965. (See Appendix A.) Thereafter on March 14, 1966, the District Court awarded claimant's attorney a fee of 25% of the benefits accruing to the *claimant alone.* (See Appendix B.) An appeal from this order was taken to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court in an opinion reported at 374 F. 2d 726. (See Appendix C.) The Seventh Circuit limited the term "claimant" in the Social Security Act above cited to the applicant alone excluding any dependent members of claimant's family. Two opinions of the United States Court of Appeals for the Fourth Circuit are squarely opposed to this interpretation of the Seventh Circuit. The Fourth Circuit so decided on May 12, 1966 in the cases of *Redden* v. *Celebrezze,* 361 F. 2d 815 and *Lambert* v. *Celebrezze,* 361 F. 2d 679, rehearing denied in both cases at 370 F. 2d 373 on December 8, 1966. The opinion of the Fourth Circuit *en banc* on rehearing is an excellent, in depth, discussion of the applicable section of the Social Security Act. At p. 374 Chief Judge Haynsworth speaking for the court stated:

"Section 332 of the Act[1] authorizes the Court in such cases to fix and allow a reasonable fee for services rendered to such a claimant in judicial proceedings, but provides that no such fee may exceed 'twenty-five per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.' The Secretary is authorized to pay a fee so allowed directly to the attorney out of the benefits otherwise payable to his client, and the attorney is prohibited from charging more.

"The provision for judicial determination of the fee and the insertion of a statutory maximum was prompted by reports that exorbitant fees had been charged and collected by lawyers representing claimants of Social Security benefits in the federal courts,[2] but we find nothing in the legislative history of the statute which enlightens us concerning the congressional intention expressed in the words 'past-due benefits to which the claimant is entitled by reason of such judgment.'

"The words are susceptible of a narrow, literal interpretation which would limit the fee basis to the accrued benefits payable to the claimant on his own behalf, excluding entirely the benefits payable on the claims of dependents. Some members of the Court are inclined to read the statute that way. A majority, however, reads the statute more broadly.

"To place the problem in focus, we may refer to the *Redden* case as illustrative. Redden, claiming physical incapacity for any work, filed a claim for disability benefits on his own behalf. He also filed an application for insurance benefits for his seven children, and, in that application, he is listed as the applicant. While any benefits received by him pursuant to that application would be for the support and maintenance of his children, he is still the applicant in a literal and substantive sense. His wife, as applicant, filed a separate application for benefits to a wife of a

1. 42 U. S. C. A. § 406(b).

2. See S. Rep. 404, 89th Cong. 1st Sess. 422.

disabled insured individual. Any benefits payable on that application, of course, would be paid directly to the wife, but would, within an active family unit, inure to the benefit of the husband substantially to the same extent as if they were paid directly to him.

"The interdependence of the claims is readily apparent in the Act, itself. Their interrelation provides an overall family benefit measurable in part by the number of dependent family members. Under 42 U. S. C. A. § 402, a wife of a disabled insured husband is not entitled to benefits if she is under the age of 62 and has no children who are under the age of 18 and entitled to benefits. A child is entitled to benefits only if under the age of 18 and dependent for normal support upon the insured parent. Section 403 provides maximum limitations upon the overall family benefits. To that extent, they are clearly lumped together. Moreover, under § 405(b) after an administrative decision, a dependent has a right to become a formal party to the administrative proceedings and to a hearing, and, under § 405(g), any such dependent who becomes a party to the administrative proceedings has a right to obtain judicial review of the primary claim of the insured individual.

"In the absence of particularized questions of the qualification of a dependent claimant, his age or his relation to or dependence upon the insured individual, all of the claims are of a part. In these cases, and in the usual disability insurance case, the only real issue is the disability of the insured individual. Once that is established, allowance of the claims of the other qualified members of the family is substantially automatic. Surely the primary claimant's interest is not limited to the benefits which will be payable upon his primary claim, for, as long as he is a member of the active family unit, his interest will extend without diminution to all of the interrelated family benefits allowable to him and to his dependents.

"With these factors in mind, we do not think the words 'past-due benefits to which the claimant is entitled by reason of such judgment' can be limited to

the benefits payable on the primary claim. As we have seen, the claimant, Redden, is, in fact, the claimant for his children's benefit, as well as those payable on the primary claim. Those benefits will be payable to him as a result of a judgment in his favor on the primary claim. Though allowance of the dependent claims in this instance would be by administrative action following the judgment, the allowance and the payments will be the direct consequence of the judgment.[3] If Redden is literally the claimant with respect to the benefits of the children so that their accrued benefits would be included in the base of the computation of the fee, it would seem an arbitrary thing to exclude the wife's benefits from the base in light of the statute's concern with the family as a unit and the close interrelation of the three claims.

"If Congress had intended the fee base to be limited to benefits payable on the primary claim, it would hardly have provided the means for its universal avoidance. The lawyer, seeking a larger fee, in every case could make the dependents parties to the administrative proceeding and parties to the judicial proceeding. With all claimants before the court, the limitation of § 406(b)(1) could not be confined to the benefits payable to one claimant only.

"For these reasons, we think the statutory words 'past-due benefits to which the claimant is entitled by reason of such judgment' mean the entire group of benefits payable to the primary claimant on his own behalf and to him and other dependent members of his family on their behalf."

No petition for a writ of certiorari has been filed in the *Redden* and *Lambert* cases and the time for such has now lapsed. On July 8, 1966, the United States District Court for the Western District of Virginia in the case of *Blankenship* v. *Gardner*, 256 F. Supp. 405, interpreted this section of Social Security Act the same as the Fourth Circuit in

3. We assume, of course, the absence of any question that the children listed by Redden are his and are dependents.

Redden and *Lambert*. The case of Sims *vs.* Gardner was decided contra to *Redden, Lambert* and *Blankenship* by the United States District Court Eastern District of Tennessee on June 13, 1966, reported 255 F. Supp. 825 which has been appealed to the United States Court of Appeals for the Sixth Circuit, No. 17356 pending, and was argued April 12, 1967 and at the time this brief is written no decision has been reported. Also on this subject is *Mircale* v. *Celebrezze* (6th Cir. 1966), 351 F. 2d 361 the same question is touched on very superficially.

REASONS FOR GRANTING THE WRIT.

These conflicting decisions present an impairment to the uniform and proper administration of the Social Security Act and should be resolved by this Court. This is of substantial moment to secial security claimants, the bar, and those charged with administering the Social Security Act.

CONCLUSION.

This court should grant this writ of certiorari to resolve this conflict.

Respectfully submitted,

ALLEN SHARP,
SAM W. LITZENBERGER, JR.,
115 North Monroe Street,
Williamsport, Indiana 47993,
Attorneys for Petitioner.

June 21, 1967.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins, *Plaintiff*, *vs.* Anthony J. Celebrezze, Secretary of Health, Education, and Welfare, *Defendant.*	Lafayette Civil No. 282.

ORDER AND MEMORANDUM OF DECISION.

This matter is now before the court for disposition on cross motions for summary judgment filed by the defendant April 26, 1965, and by the plaintiff May 6, 1965. Judgment must be entered in favor of the plaintiff.

This action is an appeal to review the determination of the Hearing Examiner, acting under the authority of the Secretary of Health, Education, and Welfare, that the plaintiff's disability insurance benefits were properly discontinued as of December 31, 1962, under the Social Security Act, 42 U. S. C. § 425. Review in this court, authorized by 42 U. S. C. § 405(g), is limited to questions of law involved in the Secretary's determination and to a con-

sideration of whether the Secretary's findings of fact are supported by substantial evidence in the record.

The plaintiff, an operator of power cranes and drag lines, was granted disability insurance benefits under the Social Security Act after he became unable to work on August 26, 1960 at the age of 52. The benefits became effective as of March 1961 and were terminated as of December 1962 on a determination by the Secretary that plaintiff was no longer "disabled" under the provisions of the Act. The termination of benefits was affirmed upon reconsideration. The plaintiff requested a hearing, which was held October 9, 1963. The Hearing Examiner affirmed the prior determination and the Appeals Council denied plaintiff's request for review on May 6, 1964. This timely appeal is taken from determination of the Hearing Examiner, which is also the final decision of the Secretary of Health, Education and Welfare.

The crucial question on review by this court is whether there is substantial evidence to support the finding that plaintiff's disability has ended. "Disability" is defined by the Act as "inability to engage in any substantial gainful activity by reason of any medically determinable physical . . . impairment which can be expected . . . to be of long-continued and indefinite duration." 42 U. S. C. § 423(c)(2). Judge Friendly, writing for the court in *Kerner* v. *Flemming*, 283 F. 2d 916, 921 (2d Cir. 1960), stated the issues involved in a determination of disability under this section:

> "Such a determination requires resolution of two issues—what can applicant do, and what employment opportunities are there for a man who can do only what applicant do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."

In reversing the district court's affirmance of the Secretary's determination in a case similar to the instant case,

Judge Brown, writing for the court in *Butler* v. *Flemming*, 288 F. 2d 591, 595 (5th Cir. 1961), stated that the test of availability of employment within the applicant's competence was whether the evidence on the record contained "any indication of any specific work less exacting (than the work from which he is now foreclosed) within his residual competency and reasonably available as a prospective source of employment in the general area where he lives."

The exhibits at the hearing in the instant case included reports and letters from five doctors who had examined the plaintiff. The reports of two of the doctors were presented to the Department of Health, Education, and Welfare before the plaintiff was declared to be disabled and were the reports of the doctors who were treating the plaintiff as a patient. The reports of the other three doctors were presented after the original award and were made by doctors solely for the purpose of ascertaining whether or not the plaintiff's disability continued. These reports establish that the plaintiff became disabled by reason of a ventral hernia resulting from a gall bladder operation. Four attempts were made to repair the hernia, which is about the size of a human fist. An examination in February 1963 revealed that it exuded a "serum" that was apparently of superficial origin. In December 1963, Dr. Nelson stated that further attempts to repair the hernia would probably be futile and that improvement was unlikely. The Plaintiff has other physical difficulties, including almost complete blindness in his left eye.

The plaintiff has worked as a power crane or drag line operator in strip mines all his life except at one earlier time when he did some farm work. Plaintiff's testimony that he is unable to do farm work in his present condition is uncontradicted in the record. He has a seventh grade education and can read, write, and do simple arithmetic, although plaintiff testified he is not very good at arith-

metic. Joseph Ganns, a vocational rehabilitation expert, testified at the hearing that the plaintiff is "limited in transfer of skills."

While the general burden of proving disability is upon the applicant, he is not required to "go down the list and verbally negative his capacity for each (industrial occupation) or their availability to him as an actual opportunity for employment." *Butler* v. *Flemming, supra,* at 595. The record in the instant case contains evidence of the possibility of plaintiff finding employment in only three job areas. This does not include farming, which the record indicates without contradiction is not within applicant's competency. The plaintiff, according to Mr. Gann's evaluation, might be able to work as a truck driver or, if the medical conclusions of Dr. Levin are correct, at his former job as a crane operator if the lever controls are powered by more modern methods of electricity or air. The Hearing Examiner seemed to consider that plaintiff might also be able to drive a taxi, although Mr. Ganns declined to endorse that proposition.

Mr. Ganns' testimony that plaintiff might be able to drive a truck is not based on plaintiff's physical capabilities, but on a study of the transferability of skills of a person who has formerly been a crane operator. There is no evidence in the record that plaintiff is physically capable of driving a truck or a taxi. Likewise, there is no evidence that any such employment opportunities are reasonably available to a person with an unrepairable hernia as serious as that suffered by this plaintiff. Such jobs are generally accompanied by the lifting of the truck's cargo or the luggage of taxi passengers, the opening of taxi doors that requires much awkward reaching, and other physical exertions beyond the competency of this plaintiff. The Hearing Examiner cannot stretch inferences so far that evidence of transferability of skills can support a conclusion of

physical competency. There was no evidence that a transferability of skills exists from operating a crane to driving a taxi.

Nor is this court favorably impressed, to put it mildly, with the reasonableness of suggesting that a man who is blind in one eye should be asked, or even allowed, to seek employment as a truck driver or a taxi driver. There certainly is no evidence in this record to indicate that such a man is reasonably likely to find an employer willing to hire him as a truck or taxi driver. The vision requirements for obtaining a public passenger chauffeur's license from the State of Indiana almost certainly could not be met by a one-eyed man. The court finds that there is no evidence whatsoever to support the Hearing Examiner's finding that plaintiff has any practical opportunity to find employment driving a truck or a taxi.

If the Hearing Examiner's determination is to stand, it must rest on the reasonable availability to the plaintiff of employment in his former line of work. The Examiner's conclusion that such employment is available and within plaintiff's competency must rest upon the reports of Dr. Stanley Levin, an expert in internal medicine, and upon the testimony of Mr. Ganns. The record contains no other evidence to support such a conclusion.

It is significant that Dr. Levin nowhere states in his reports that plaintiff is capable of engaging in his former regular work. He does say it is his opinion that plaintiff can operate a crane, but only "if heavy exertion is not required to move the levers." The only evidence on the amount of exertion required is plaintiff's statement that pulling levers on a crane involved much more physical effort than shifting gears in a car, and the testimony of Mr. Ganns that operating levers in a "modern" crane required no more than fifteen pounds of arm pressure. The fact that plaintiff can operate an automobile gear shift

for short trips to town and back, or even that he is capable of pushing and pulling the levers on a "modern" crane does not support a finding that he can operate a crane. There is no evidence in the record indicating the capacity of plaintiff's arm pressure unless it is Dr. Levin's report that plaintiff cannot lift anything weighing more than five or six pounds. There is no evidence that Dr. Levin had ever moved the lever of a power crane or knew how much pressure was required to move one, and his opinion that plaintiff should be able to "operate levers" is not a substantial basis for the Examiner's conclusion that plaintiff was physically capable of operating the levers of a power crane as a full-time occupation. "Satisfaction of the claimant's statutory obligation to show that he is not able to do any substantial work is to be judged in a practical way." *Ratliff* v. *Celebrezze,* 338 F. 2d 978, 983 (6th Cir. 1964); *Kerner* v. *Flemming, supra.* The test for determining an applicant's competency and the availability of work, as stated by Judge Sobeloff, requires that the availability and the nature of the work be judged "in the light of what is reasonable and not of what is merely conceivable." *Thomas* v. *Celebrezze,* 331 F. 2d 541, 546 (4th Cir. 1964). On this record there is no evidence that plaintiff can reasonably work a power shovel on a full-time basis, or that there is any practical likelihood that he could find an employer willing to hire someone with all of plaintiff's physical limitations.

Dr. Levin reported that plaintiff "will not be able to do any bending beyond that ordinarily associated with sedentary occupation." The Examiner himself conceded at the hearing that a crane operator has to do some bending. Plaintiff's testimony is unchallenged that the lifting of cables is sometimes involved and that there are times when a crane operator may have to climb around on the machine to do repair work. Such activities are admittedly beyond

plaintiff's physical competency. Dr. Levin reported that plaintiff could not do climbing "which would require a moderate amount of strain." The Hearing Examiner suggested that plaintiff could use a ladder to climb the eight feet up to the crane once in the morning, and down again at night, as a means of circumventing plaintiff's lack of ability to climb onto the crane in the ordinary way. Neither the plaintiff nor Mr. Ganns had any idea whether an employer would object to the inconvenience that would be caused by such a method. Plaintiff agreed that he might be able to work levers and that he could climb up and down the proposed ladder once a day, but protested that there was much more to the job than those two operations. His testimony about the nature and details of the work is unchallenged throughout the entire record. A work activity report filed by a claims representative for the Secretary, and which is one of the exhibits in the record, describes plaintiff's inability to lift anything or to be "climbing around shovel and rig" as factors that have an effect on the quality of plaintiff's work as a crane operator. The same report stated that plaintiff "had to use hands and feet to control levers and operate shovels (diesel and compressed air) for controls and brakes." Mr. Ganns' testimony that plaintiff could "probably" operate the levers on "modern cranes" and climb up and down once a day and that plaintiff's ability to operate the levers depended on the body position is too speculative to support a finding that the plaintiff could reasonably and practically find and engage in work of this nature in view of his physical limitations. "There must be something more tangible establishing what employment opportunities there are for a man with his impairment." *Stancavage* v. *Celebrezze*, 323 F. 2d 373, 378 (3d Cir. 1963). "A theoretical ability to so engage is not enough if no reasonable opportunity is available." *Celebrezze* v. *Warren*, 339 F. 2d 833 (10th Cir. 1964).

The Hearing Examiner's question about the number of existing jobs for crane operators, directed to Mr. Ganns, was deliberately phrased to exclude any inquiry as to the practical availability of employment of crane operators in the construction industry for men with plaintiff's physical limitations. Mr. Ganns' answer, "Oh, yes, a lot of construction work is going on," casts no light on the availability of job opportunities for this plaintiff. "Since the abstract 'average' man is not the standard to be used, *Pearman* v. *Ribicoff*, 307 F. 2d 573 (4th Cir. 1962), there must be evidence to show the reasonable availability of jobs which this particular claimant is capable of performing." *Cyrus* v. *Celebrezze*, 341 F. 2d 192, 196-197 (4th Cir. 1965); *Ray* v. *Celebreeze*, 340 F. 2d 556 (4th Cir. 1965).

The evaluation by Judge Sobeloff of a case similar to the instant case is applicable here:

> "Employers are concerned with substantial capacity, psychological stability, and steady attendance; they will not unduly risk increasing their health and liability insurance costs. It is unrealistic to think that they would hire anyone with the impairment of this claimant." *Thomas* v. *Celebrezze, supra* at 546.

Plaintiff urges that the rejection of plaintiff's application for vocational rehabilitation by the Bureau of Old-Age and Survivors Insurance, the same bureau which terminated his disability benefits, should bind the Secretary in his determination of plaintiff's disability. The rejection was based on a determination by the Indiana Vocational Rehabilitation Division on March 28, 1963 that plaintiff's "impairment (was) too severe." This court does not need to reach that point in view of the findings above. The situation, however, poignantly illustrates the dilemma of a person considered by the same agency of government to be too disabled to learn a new job, yet not disabled enough to be entitled to his Social Security insurance benefits.

This court finds that there is no substantial evidence in the record to support the Secretary's finding that plaintiff's disability terminated as of December, 1962. There is abundant evidence in the record to establish that plaintiff is disabled within the meaning of the Act and the cases, even if such a conclusion were based solely on the reports and testimony upon which the Secretary sought to base his contrary conclusion. There is no apparent reason to remand the case or give the Secretary further opportunity to take testimony, and no such request has been made. The litigation has already consumed more than two and one-half years since plaintiff's benefits were terminated. *Cyrus* v. *Celebrezze, supra*; *Ratliff* v. *Celebrezze, supra.*

The decision of the Secretary of Health, Education, and Welfare terminating plaintiff's disability benefits as of December, 1962 is reversed. The Secretary is ordered to allow and pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated. The period of disability must include at least the period until the date of the hearing from which this appeal is taken.

Entered this 30th day of September, 1965.

JESSE E. ESCHBACH,
United States District Judge.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins, *Plaintiff*,
vs.
John W. Gardner, Secretary of Health, Education and Welfare, *Defendant.*

Lafayette Civil No. 282.

ORDER.

Pursuant to the order of this court, entered February 1, 1966, the defendant has filed a memorandum showing the defendant's full compliance with the order of this court entered September 30, 1965. The plaintiff's memorandum, which was filed on January 31, 1966, but which did not come to the court's attention until after its order was filed on February 1, 1966, the following day, indicates that the plaintiff is entirely satisfied with the defendant's compliance. There remains only the question of a determination and certification of the amount of attorney's fees allowable to the plaintiff's counsel under § 206(b)(1) of the Social Security Act as Amended (Section 332 of P. L. 89-97), 42 U. S. C. A. § 406(b)(1) (Supp. 1965).

The plaintiff and his attorney entered into a contingent fee contract pertaining to this litigation. That contract was executed and this action was filed before the Social Security Act was amended to provide for the court's determination of counsel fee. However, the words of the statute provide for such determination "whenever a court renders a judgment favorable to a claimant" in a case of this nature. 42 U. S. C. A. § 406(b)(1) (Supp. 1965). It was apparently the intent of Congress to have such attorney's fees determined by the court in all appropriate judgments rendered by the court, not just in judgments entered in cases filed or relating to contracts executed subsequent to the effective date of the amendment to 42 U. S. C. § 406. Such legislation is unquestionably valid. *Fleming* v. *Rhodes*, 331 U. S. 100, 67 S. Ct. 1140 (1947); *Calhoun* v. *Massie*, 253 U. S. 170, 40 S. Ct. 474 (1920). United States district courts had validly exercised such power even before the congressional enactment of express authorization to determine attorney's fees. *Celebrezze* v. *Sparks*, 342 F. 2d 286 (5th Cir. 1965) affirming *Sparks* v. *Celebrezze*, 228 F. Supp. 508 (E. D. Texas 1964); and *Folsum* v. *McDonald*, 237 F. 2d 380 (4th Cir. 1956). The plaintiff's attorney himself has represented to this court that he was familiar with the decisions in the two *Sparks* cases, *supra*.

From the evidence in the record of this case, it is impossible for this court to determine the exact dollar amount of past-due benefits to which the plaintiff, Raymond Hopkins, himself is entitled from January 1963, the date of the termination of his benefits, until September 30, 1965, the date of the judgment of this case. This court therefore determines that the amount of attorney's fees to which the plaintiff's attorney is entitled is twenty-five per cent (25%) of the amount of those past-due benefits.

Accordingly, this matter having come before the court

pursuant to the petition of plaintiff's attorney for approval and allowance of a fee for representation before this court pursuant to Section 206(b)(1) of the Social Security Act as Amended (Section 332 of P. L. 89-97), it is ordered that a fee is hereby awarded to the attorney for the plaintiff in this proceeding in the amount of twenty-five per cent (25%) of the payment due to the plaintiff, Raymond Hopkins, from January 1, 1963 through September 30, 1965, which amount shall be certified by the defendant for payment by the Secretary of the Treasury directly to the attorney, Allen Sharp.

Entered this 14th day of March, 1966.

JESSE E. ESCHBACH,
United States District Judge.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1966—January Session, 1967.

No. 15724.

RAYMOND HOPKINS,
Plaintiff-Appellant,
vs.
JOHN W. GARDNER, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

March 15, 1967.

Before HASTINGS, *Chief Judge,* and FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This appeal, brought in reality by attorney Allen Sharp, involves Sharp's claim that the district court erroneously limited his fee for services in an action to review an administrative decision suspending insurance benefits under the social security act. The problem is the construction of a statute, enacted in 1965, authorizing the court to allow a reasonable attorney's fee where, in such action, a judgment favorable to a claimant is recovered, the fee not to be "in excess of 25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of such judgment.'"[1]

The secretary contends that the statute applies to all judgments entered after the statute was enacted, and that the 25 percent maximum must be computed upon the total of the past-due benefits to which plaintiff was individually entitled. Sharp contends that the statute was not intended to apply in a case where the fee had been agreed upon before the statute was enacted, but that if it be applicable, the 25 percent is to be computed upon an amount which includes the past-due benefits to which plaintiff's wife and children were entitled, as well as plaintiff's own.

In 1961 and 1962, Raymond Hopkins was receiving disability insurance benefits under the social security act, and his wife and children were receiving the benefits provided by the act for the wife and dependent children of an individual entitled to disability insurance benefits. Late in 1962 the department notified Hopkins that it considered him able to do substantial gainful work and that December, 1962, would be the last month for which he and his wife and children would be entitled to benefits. Hopkins exhausted his administrative remedies, but the final decision was that his benefits had been properly terminated.

Hopkins brought this action to review. His wife and children were not named in either the proceedings for administrative review or as plaintiffs in this action. On September 30, 1965, the district court reversed the secretary's decision and ordered him to "pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated."

On January 24, 1966, the department wrote Hopkins that because it had been decided that Hopkins was still

1. 42 U. S. C. A. § 406(b)(1), Public Law 89-97, July 30, 1965.

disabled "you and your family will continue to receive benefit payments." Hopkins' individual past-due benefits through December, 1965, totalled $3,744.80, his wife's benefits $1,287.80, and the children's $3,463.50.

The district court awarded Sharp a fee of 25 percent of the past-due benefits payable to Hopkins individually, up to September 30, 1965, the date of the judgment. The statute to be construed is as follows:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph."[2]

Paragraph (b) (2), enacted at the same time, makes it a misdemeanor to charge for services in connection with proceedings to which paragraph (1) is applicable any amount in excess of that allowed by the court.

1. *Application to the instant case.* Sharp and Mr. and Mrs. Hopkins signed a contract in May, 1964, in which the Hopkins employed Sharp to pursue the disability claim in court and fixed Sharp's compensation at 40 percent of the benefits accrued if awarded by the district court, without appeal, and 50 percent if it became

2. 42 U. S. C. A. § 406(b) (1), Public Law 89-97, July 30, 1965.

necessary to appeal. The complaint was filed July 2, 1964. The statute was enacted July 30, 1965. Most of the services had been rendered before that date. Judgment was rendered September 30, 1965.

Mr. Sharp relies on the rule of construction that "a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."[3] The judgment was rendered, however, after the statute was enacted, and the statute says "Whenever a court renders a judgment. . . ." Strictly speaking, application of this statute to a judgment rendered after its enactment is not retrospective. The retrospective impact results from the fact that this action was begun before the enactment, and that plaintiff and the attorney had agreed upon a fee before that. The same will be true with respect to many judgments rendered after enactment, though the proportion of time elapsed and services rendered before and after the enactment will vary widely. The difficulty of formulating any exception of already pending cases which would still serve the purpose Congress had in mind suggests that it was a deliberate choice to apply the new rule to all cases not yet terminated.

The report of a senate committee makes it plain that Congress was concerned about the charging of inordinately large fees, usually resulting from a contingent fee arrangement,[4] and it seems a very reasonable choice to make the remedy apply to all pending cases.

---

3. 2 Sutherland, Statutory Construction 115 (3rd ed. 1943).

4. "It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of

The fourth circuit has held the statute applicable where judgment was entered after the enactment, notwithstanding the existence of a prior fee contract.[5]

We find no basis for any construction which would exempt the allowance of fee in the instant case from the application of the statute.

2. *The base upon which the 25 percent maximum is to be computed.* Mr. Sharp points out that although the past-due benefits for Raymond Hopkins individually, accrued to the end of 1965 (something less at date of judgment) were some $3,700, the judgment also determined, in actual though incidental, effect, that Mrs. Hopkins and the children were entitled to benefits, so that some $8,000 were the real total amount recovered for the Hopkins family as a result of Sharp's efforts. He contends that the 25 percent limitation should be computed upon the larger figure.

The key word is "claimant," as used in sec. 406 (b) (1). That statute operates "whenever a court renders a judgment favorable to a claimant," the claimant must have been "represented before the court by an attorney," and the maximum limit of attorney's fees is measured by a percentage of the benefits "to which the claimant is entitled by reason of such judgment." The word "claimant" is found in the preceding subs. (a), which deals with

---

the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

"The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 percent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. . . ." S. Rep. No. 404, 89th Cong., 1st Sess. 422 (1965), U. S. Code Cong. & Admin. News 1965, p. 2062.

5. *Lambert* v. *Celebrezze* (4th Cir. 1966), 361 F. 2d 677, 679; *Redden* v. *Celebrezze* (4th Cir. 1966), 361 F. 2d 815, 816.

representation of claimants in administrative proceedings before the secretary.

Mr. Sharp would contend that "claimant" may be read in the plural and includes those whose right to what may be termed derivative benefits is established by the judgment in favor of one found to be entitled to what may be termed primary benefits. If Mr. Hopkins is the only "claimant," the district court correctly limited the fee to 25 percent of the past-due benefits accrued to him. If his wife and children are also "claimants," the district court might have allowed a larger fee, but not in excess of 25 percent of the past-due benefits accrued to all.

Under a strict construction of the words in the statute, no one could be a "claimant . . . who was represented before the court by an attorney" unless he were a plaintiff in the action. Here, the only plaintiff was Hopkins.

But while such construction would exclude the wife and children from the category of "claimant" in this case, because they were not plaintiffs, and hence would exclude their past-due benefits from the base on which the maximum attorney's fee would be computed, it would make the result depend on a procedural detail. Here the administrative decision under review terminated the payment of benefits to all four in the Hopkins family upon the single ground that Hopkins was no longer entitled, and all could have joined as plaintiffs. In many cases, although each beneficiary must make a separate application, it would be possible to make such application and have each applicant become a plaintiff in an action to review the administrative denials. It does not seem satisfactory, therefore, to rest our decision upon the proposition that a beneficiary is not a "claimant" unless he is a "plaintiff."

In broader terms, the question is whether "claimant"

under this statute includes all persons whose entitlement to benefits is established by the resolution of the issue before the court, in this case, Mr. Hopkins' disability, or whether "claimant" as used in the statute means only the applicant for primary benefits in any case where his entitlement is the issue.[6]

The fourth circuit has adopted the first construction, holding that "the statutory words 'past-due benefits to which the claimant is entitled by reason of such judgment' mean the entire group of benefits payable to the primary claimant on his own behalf and to him and other dependent members of his family on their behalf."[7]

We, however, with all respect to our brethren of the fourth circuit, choose the latter construction. We do so because it more closely limits fees, and such was the concern of Congress in enacting the statute. It also seems probable that those who drafted the statute assumed that where the dispute was over the entitlement of the individual applying for primary benefits, only he, and not those who would be entitled to derivative benefits, would appear as claimant before the secretary or as plaintiff before the court. The words they chose should be interpreted accordingly even though, as previously pointed out, it may be possible to have all interested beneficiaries formally pursue the administrative remedy and seek judicial review as plaintiffs. Furthermore, although "the time and labor required, the novelty and difficulty of the questions involved and the skill requisite

6. Even under the latter alternative, an applicant for derivative benefits would be deemed a "claimant" under some circumstances. For example the issue might be whether an applicant was as she claimed to be, the wife of an individual who was entitled to primary benefits.

7. *Redden* v. *Celebrezze, Lambert* v. *Celebrezze* (4th Cir. 1966), 370 F. 2d 373, 375, aff'g on rehearing *en banc* 361 F. 2d 815 and 361 F. 2d 677.

properly to conduct the cause'' make up but one of the elements thought proper in determining a lawyer's fee,[8] this element is no greater in presenting an action to review denial of benefits to an applicant who is single and without dependents, than in presenting the same issues in an action where the applicant has a wife and children. We think it unlikely that Congress intended that in a case like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single.

We consider the district court reached the correct decision, and the order appealed from is

AFFIRMED.

8. The others are: "(2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. . . ." ABA Canons of Professional Ethics No. 12.

APPENDIX D.

UNITED STATES DISTRICT COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Friday, April 21, 1967.

Before:

Hon John S. Hastings, *Chief Judge,*
Hon. Elmer J. Schnackenberg, *Circuit Judge,*
Hon. Win G. Knoch, *Circuit Judge,*
Hon. Latham Castle, *Circuit Judge,*
Hon. Roger J. Kiley, *Circuit Judge,*
Hon. Luther M. Swygert, *Circuit Judge,*
Hon. Thomas E. Fairchild, *Circuit Judge,*
Hon. Walter J. Cummings, Jr., *Circuit Judge.*

Raymond Hopkins,
Plaintiff-Appellant,
vs.
No. 15724
John W. Gardner, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

LIBRARY
SUPREME COURT, U. S.

FILED
JUL 24 1967
JOHN F. DAVIS, CLERK

No. 276

In the Supreme Court of the United States

OCTOBER TERM, 1967

RAYMOND HOPKINS, PETITIONER

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS, PETITIONER

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

On July 2, 1964, claimant Raymond Hopkins instituted an action in a federal district court under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to obtain review of a determination by the Secretary of Health, Education and Welfare that he was no longer entitled to disability benefits under Section 223 of the Social Security Act, 42 U.S.C. 423 (Pet. App. 1a–2a). On September 30, 1965, the district court entered an order reversing the Secretary's determination and directing the Secretary to "pay disability benefits to the plaintiff from the time of their termination until such time as a new determina-

270-470—67

tion is made that plaintiff's disability has, in fact, terminated" (Pet. App. 9a).

Counsel for the claimant had earlier, in May 1964, entered into a contingent fee agreement with the claimant and his wife, providing for a minimum fee of 40 per cent of accrued benefits. But the district court, relying on Section 206(b)(1) of the Act, added in 1965,[1] awarded counsel a fee of 25 per cent of the past-due benefits payable to claimant Hopkins (Pet. App. 10a–12a).

Counsel appealed, contending that the district court should have awarded him a fee based not only on the accrued disability benefits payable to claimant Hopkins but also on the accrued benefits payable to his dependent wife and children. The court of appeals affirmed, noting that it was "unlikely that Congress intended that in a case like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single" (Pet. App. 20a).[2] Counsel then filed the instant petition in the name of the claimant.

---

[1] Section 206(b)(1) (42 U.S.C. (1965 Supp.) 406(b)(1)) provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

[2] Counsel for claimant also argued in the court of appeals

We believe that the decision below is correct. It conforms to the clear language of Section 206(b)(1)—which expressly limits the award of fees to a percentage of benefits payable to "claimant"—and effectuates the congressional purpose of limiting the payment of "inordinately large fees" out of social security funds. See S. Rep. No. 404, 89th Cong., 1st Sess., p. 122.[3] However, as the court below noted, a contrary view has been expressed by the Court of Appeals for the Fourth Circuit. *Lambert* v. *Celebrezze,* 361 F. 2d 677, and *Redden* v. *Celebrezze,* 361 F. 2d 815, both reaffirmed on rehearing *en banc* in 370 F. 2d 373.

In view of the substantial number of social security cases, the issue of the proper construction of the 25 per cent limitation on counsel's fees imposed by the 1965 amendments is bound to recur. And there is an acknowledged conflict in approach among the circuits. At the same time, however, we point out that the Fourth Circuit has not as yet actually sanctioned any award in excess of 25 per cent of the claimant's own benefits. In *Redden,* indeed, the court indicated that in the circumstances of that case an award exceeding that figure would be improper (370 F. 2d at 376); in *Lambert* it had no occasion to pass on an actual award. We believe that in practice the Fourth Circuit

---

that Section 206(b)(1)—which became effective on July 30, 1965—was inapplicable to a prior contingent fee arrangement. The court of appeals rejected this contention and counsel has apparently abandoned it here.

[3] Only last month, the Court of Appeals for the Sixth Circuit, in *Sims* v. *Gardner*, No. 17356, adopted the view of the court below. We have reprinted its opinion in the Appendix, *infra*, pp. 5–9.

will be very reluctant to approve any awards that amount to more than 25 per cent of the claimants' benefits standing alone. Moreover, now that the Sixth and Seventh Circuits have adopted the contrary construction, the Fourth Circuit may reexamine its position. These considerations suggest that this Court might deem it appropriate to deny review of this case notwithstanding the existence of a conflict in principle.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

APPENDIX

United States Court of Appeals for the Sixth Circuit

No. 17356

PEARLIE SIMS, WIDOW AND NEXT OF KIN OF ALFRED SIMS, PLAINTIFF-APPELLANT

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT-APPELLEE

On appeal from the United States District Court for the Eastern District of Tennessee, Southern Division

Decided June 10, 1967

Before WEICK, Chief Judge, MCCREE, Circuit Judge, and KENT, District Judge,[1]

MCCREE, *Circuit Judge:* This appeal, though captioned in the name of Pearlie Sims, is actually the appeal of her attorney, who disputes the amount of the fee fixed for him by the district court under 42 U.S.C. § 406(b)(1) following his successful district court challenge of the Secretary's denial of social security disability insurance benefits to Mrs. Sims' husband. Upon the husband's death, Mrs. Sims had been

[1] Honorable W. Wallace Kent, Chief Judge, United States District Court for the Western District of Michigan, sitting by designation.

substituted as plaintiff in a representative capacity in the district court proceedings. The court fixed the attorney's fee at "twenty-five percent of the sum recovered of the defendant by the plaintiff." The attorney moved for a supplemental order providing that he should receive 25 percent not only of the amount to which Mr. Sims was entitled, but also of the amounts which Mr. Sims' dependents might, upon application, receive as a result of Mr. Sims' award. The district court denied this motion.

The statute which the attorney claims the district court to have erroneously construed reads in pertinent part as follows:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment. * * * 42 U.S.C. § 406(b)(1).

The Courts of Appeals of two circuits have already considered the question of the basis to which the statutory percentage is to be applied in determining the maximum attorney's fee. The Seventh Circuit, in *Hopkins* v. *Gardner*, —— F. 2d —— (1967), has held, in accord with the ruling of the district court in the present case and with the position urged by the Secretary in this appeal, that the maximum attorney's fee should be 25 percent of the past-due benefits payable to the insured only. The Fourth Circuit in *Lambert* v. *Celebrezze*, 361 F. 2d 677 (1966) and *Redden* v. *Celebrezze*, 361 F. 2d 815 (1966) *rehearing denied en banc*, 370 F. 2d 373 (1966), has agreed with the attorney in this case that the maximum should be 25 percent of the amount payable to the insured and also of the amount

which may be payable to his dependents as a consequence of the judgment in his favor.

It is noteworthy that in any given case, the Fourth and Seventh Circuits might arrive at the same dollar amount in determining the appropriate fee. Although the Fourth Circuit uses a larger basis, it recognizes that "the statute requires that the judge determine a reasonable fee," and that such a fee might be substantially less than 25 percent of the amount payable to the insured. 370 F. 2d at 376. The Seventh Circuit, on the other hand, suggests that if an attorney must prove a matter such as the relationship of a purported dependent to the insured, the court can take the dependent's benefits into account in determining the attorney's fee. —— F. 2d at ——. Hence, it may be said that the issue between the two circuits is whether, as a matter of law, the court, in setting the attorney fee should be precluded from taking certain amounts into consideration in the absence of special circumstances justifying the inclusion of those amounts. With deference to the Court of Appeals for the Fourth Circuit, we believe the solution of the Seventh Circuit is more closely in accord with both the plain language of the statute and with the policy which the statute was designed to further.

The reference in the statute to a judgment "favorable to a claimant under this subchapter" is of little help in solving our present problem, since both the insured and his dependents may qualify as "claimants." 42 U.S.C. §§ 402, 405 (b), (g). It is also of scant assistance that the statute requires the claimant to have been "represented before the court by an attorney," since, as both the Fourth and Seventh Circuits have noted, it is not difficult under the social security statutes to add the dependents as parties. 42 U.S.C. § 405(g). It does seem significant, however, that the

statute refers to "the past-due benefits to which the claimant is entitled by reason of such judgment." In a case such as the present one, the insured's dependents are not "entitled" to benefits as a result of a judgment in favor of the insured. This judgment is certainly helpful in paving the way for the payment of benefits to the dependents, but the dependents must still satisfy the Secretary as to their relationship to the insured and other statutory requirements. 42 U.S.C. § 402(b)–(h).

It may be observed that the Fourth Circuit, in determining that the benefits payable to both the insured and his dependents might be considered in fixing fees, stated, "We assume, of course, the absence of any question that the children listed by Redden are his and are dependents." 370 F. 2d at 375. This assumption presents certain difficulties, as the district judge recognized in the present case in his memorandum accompanying the order denying the request for additional fees:

> Dependents must establish the relationship required by statute and such relationship is at times denied by the government. There is always the possibility that dependents might have the need of representation in establishing their own rights to the payment of benefits based on another's claim, and if such representation were by a different person, or in a different proceeding, those beneficiaries' benefits could be taxed with fees above and beyond those contemplated by the statute. * * *

Even if the district court could be certain that the question of the insured's disability was the only precondition to the receipt of benefits by the dependents, we would refrain from holding that a court judgment determining the question of disability in favor of the insured would permit the dependents' benefits to be

used in fixing the attorney's fee. Section 406(b)(1) was added to the Social Security Act in 1965 for the purpose of preventing attorneys from receiving "inordinately large fees." U.S. Code Congressional and Administrative News, 89th Cong., 1st Sess., 1965, p. 2062. This court is mindful of the fact that attorneys representing social security claimants often perform arduous work in return for compensation which cannot, in any absolute sense, be termed "inordinately large." Attorneys' fees in this area, however, cannot be viewed in a vacuum, but must be examined in relation to the needs of the claimants. When so viewed, it is apparent that an increase in fees for court representation based upon the fortuity of the insured having dependents would defeat the purpose of the statute. If dependents do receive benefits, the attorney will of course be able to obtain the compensation provided by the statutes and regulations for representation before the Secretary; but only if the attorney is required to raise in the district court such issues as the relationship of a dependent to the insured should the dependent's benefits be considered "benefits to which the claimant is entitled by reason of" the judgment of the court.

The judgment of the district court is affirmed.

U.S. GOVERNMENT PRINTING OFFICE: 1967

LIBRARY
SUPREME COURT, U. S.

FILED
DEC 21 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS,

Petitioner,

vs.

JOHN W. GARDNER, Secretary of Health, Education and Welfare,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

ALLEN SHARP
SAM W. LITZENBERGER, JR.
Attorneys for Petitioner
115 North Monroe Street
Williamsport, Indiana 47993

Of Counsel:

ISRAEL STEINGOLD
STEINGOLD, STEINGOLD & SCHOVITZ
Attorney for American Trial Lawyers Association
Town Point Building
Norfolk, Virginia 23514

HAROLD H. GEARINGER
GEARINGER & VINEYARD
Suite 101, Professional Building
Chattanooga, Tennessee 37402

LAMPTON O. WILLIAMS
WILLIAMS & WILLIAMS
Williams Building
Box 113
Poplarville, Mississippi

November . , 1967

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Questions Presented	3
Statement	3
Argument	5
Conclusion	13

Citations

Cases

Alsobrooks v. Gardner, 357 F. 2d 110 (5th Cir. 1967)	4
Blankenship v. Gardner, 253 F. Supp. 405	4
Gonzolez v. Hobby, 213 F. 2d 68 (1st Cir. 1954)	9
Lambert v. Celebrezze, 361 F. 2d 679, reh. den. 370 F. 2d 373	4, 7
McKittric v. Gardner, 378 F. 2d 872 (4th Cir. 1967)	4
Miracle v. Celebrezze, 351 F. 2d 361 (6th Cir. 1966)	4
Redden v. Celebrezze, 361 F. 2d 815, reh. den. 370 F. 2d 373 (4th Cir. 1966)	4, 7
Robinson v. Celebrezze, 248 F. Supp. 149 (W.D. S.C. 1965)	8
Sims v. Gardner, 378 F. 2d 70 (5th Cir. 1967)	4, 5, 6, 7

PAGE

Statutes

Title 18, U.S.C., Sec. 3006A 9

Title 28, U.S.C., Sec. 1254(1) 2

Title 42, U.S.C., Sec. 405(g) 2

Title 42, U.S.C., Sec. 406(b)(1) 2, 3, 5, 7

Miscellaneous

U.S. Code, Congressional and Administrative News, 89th Congress, 1st Session, 1965, p. 2062 5

U.S. Code, Congressional and Administrative News, No. 5, June 20, 1967 5-6

Indiana State Bar Association, A Guide for Minimum Fee Schedules, Letter from Newton M. Goudy, Executive Secretary, reporting action of House of Delegates on October 26, 1965, and March 31, 1966, on report of the Committee on Legal Economics 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS,

Petitioner,

—v.—

JOHN W. GARDNER, Secretary of Health, Education and Welfare,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

The opinion of the District Court dated September 30, 1965, is unreported and appears in Appendix III at page 8.

A subsequent opinion of the District Court (the relevant one here) dated March 14, 1966, is unreported and appears in Appendix IV at page 26. The opinion of the Court of Appeals for the Seventh Circuit was reported at 374 F. 2d 276 and appears in Appendix VIII at page 29.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was dated and entered March 15, 1966. A timely motion for rehearing was denied April 21, 1966 (see Appendix IX at page 37). A stay of the issuance of the

mandate of the Court of Appeals had been granted by that Court, conditioned upon the filing of a petition for certiorari by June 22, 1967, which was accomplished. This Court granted certiorari October 9, 1967. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C., Sec. 1254(1). The basis of the jurisdiction of the District Court was Title 42 U.S.C. 406(b)(1) and Title 42 U.S.C. Sec. 405(g).

Statutory Provisions Involved

Section 206(b)(1) of the Social Security Act, 42 U.S.C. 406(b)(1) is amended by Section 332 of the Social Security Amendment of 1965, 79 Stat. 403 which provides in pertinent part as follows:

> "(b)(1) Whenever a court renders a judgment favorable to a claimant under this sub-chapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment of such representation except as provided in this paragraph."

Questions Presented

1. The maximum amount of attorney fees allowable to a claimant's attorney by the District Court under 42 U.S.C. 406(b)(1) as amended by Section 332 of the Social Security Amendment of 1965, 79 Stat. 403, i.e., whether the ceiling on such fees should be based on the benefits of the claimant alone or the benefits of the claimant and other dependent members of his family who receive benefits by virtue of the claimant's disability.

2. Whether indigent claimants will be able to secure the services of skilled advocates in the presentation and prosecution of disability claims under the Social Security Act in the Federal District Courts and the right and need of such disability claimant to the services of skilled counsel.

Statement

This case was commenced in the District Court on July 2, 1964 (see Complaint, Appendix II) as an appeal to reverse the decision of the Secretary of Health, Education and Welfare that Raymond Hopkins was not totally and permanently disabled within the meaning of provisions of the Social Security Act. The District Court reversed the Secretary on September 30, 1965 (see Appendix III). Thereafter, on March 14, 1966, the District Court awarded claimant's attorney a fee equal to the amount of 25% of the benefits accruing to the claimant alone on the date of the awarded judgment (see Appendix VI). An appeal from this order was taken to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court in an opinion at 374 F. 2d 276 (see Appendix VIII).

The Seventh Circuit limited the term "claimant" in the relevant sections of the Social Security Act above cited to the applicant alone, excluding any benefits due to dependent members of the claimant's family. Two opinions of the United States Court of Appeals for the Fourth Circuit are squarely opposed to this interpretation by the Seventh Circuit. The opinions of the Fourth Circuit were decided on May 12, 1966, in the cases of *Redden* v. *Celebrezze*, 361 F. 2d 815 and *Lambert* v. *Celebrezze*, 361 F. 2d 679, rehearing denied in both cases at 370 F. 2d 373, on December 8, 1966. The position of the Fourth Circuit has been followed in that Circuit by the United States District Court for the Western District of Pennsylvania in the case of *Blankenship* v. *Gardner*, 253 F. Supp. 405, decided July 8, 1966. The position of the Fourth Circuit has also been followed again by that Court in a more recent decision in *McKittric* v. *Gardner*, 378 F. 2d 872. The Fifth Circuit at this time has also taken the same position in an order entered July 20, 1967, in the case of *Alsobrooks* v. *Gardner*, which was reported at 357 F. 2d 110 (the relevant order itself is apparently unreported at this time).

In addition to the opinion in the instant case by the Seventh Circuit, the Sixth Circuit Court of Appeals in the case of *Sims* v. *Gardner*, 378 F. 2d 70, is contrary to the opinions of the Fourth Circuit and consistent with the opinion of the Seventh Circuit in this case. Also, on this subject is *Miracle* v. *Celebrezze*, Sixth Circuit 1966, 351 F. 2d 361, in which the question presented here is touched on only superficially. It is to be noted that a petition for writ of certiorari has been sought in the case of *Sims* v. *Gardner*, Misc. No. 386, now pending in this Court. The case of *Sims* v. *Gardner* and the instant case both present the same questions for review.

Argument

It was the clear intention of the District Court in its opinion in this case, dated March 14, 1966, to award to the Plaintiff's attorney the maximum fee which is permissible under the Social Security Act. The United States District Judge in this case determined such maximum was 25% of the past-due benefits to the claimant alone exclusive of any benefits due his dependent wife and dependent children. Neither the language of the pertinent section of the Social Security Act nor the legislative history warrant the restrictive interpretation put on the statute in this case and in the companion case of *Sims* v. *Gardner*. It is true in this case as in many similar cases that the dependents of the claimant, namely, his wife and two dependent children, received substantial benefits as a direct result of the efforts of the claimant's counsel and no good reason exists in the language of the statute or the legislative history to hold the Social Security disability benefits to the claimant's dependents immune from the allowance of attorney fees. It also is true that there are references in the legislative history of Section 406(b)(1) which was added to the Social Security Act in 1965 for the purpose of preventing attorneys from receiving "inordinately large fees". See U.S. Code, Congressional and Administrative News, 89th Congress, 1st Session, 1965, page 2062. The legislative history is absolutely devoid of any indication that Congress felt that a maximum fee of 25% of the benefits to the claimant and his dependents was "inordinately" high. The Court's attention is also directed to certain administrative regulations promulgated by the Department of Health, Education and Welfare as found in U.S. Code, Congressional and Admin-

istrative News, number 5, dated June 20, 1967, which the Petitioner believes to be in excess of the authority granted to the Department under the statute here in question.

This Court has granted the American Trial Lawyers Association, through its attorney, Israel Steingold, leave to file a brief amicus curiae in the companion case of *Sims* v. *Gardner*, No. 386, Misc. On October 9, 1967, this Court granted leave for the American Trial Lawyers Association to file a brief amicus curiae in the *Sims* v. *Gardner* case. The Petitioner respectfully represents that it was the express intention of the American Trial Lawyers Association to file this brief and have it considered in this case also and therefore the Petitioner respectfully requests the Court to consider the memorandum of the American Trial Lawyers Association filed in *Sims* v. *Gardner* in this case.

In this case and in the companion case of *Sims* v. *Gardner*, Misc. No. 386, there arises a great question of importance to all claimants for a period of disability under the Social Security Act as amended. The Bar, the District Courts, and the Courts of Appeal for all the Circuits require the resolution of this novel question for the sake of uniformity. The decision in this case will advise all of the interested persons, court and agencies of the maximum attorney fees which may be awarded by United States District Courts to a claimant's attorney in action for disability benefits under the Social Security Act.

That the mass of indigent and disabled claimants are equally as much in need of legal representation as indigent defendants in criminal cases is without question. The one seeks to preserve his freedom and reputation, and the other seeks to obtain the means of obtaining and sustaining freedom from hunger and despair.

The question in both this case and in *Sims* involves the interpretation of Title 42 U.S.C., Sec. 406(b)(1) and imposes the particular question of the base of which the fee determined by the District Court is to be computed, i.e., on only that portion of the past-due benefits paid directly for and to the head of families disabled, individual claimant, or some of the benefits paid not only to the head of family disabled, individual claimants but to his dependents resulting from the successful prosecution of the suit in a United States District Court.

The significant fact here involved under the Social Security Act, as amended, the judicial determination of the question whether benefits shall be paid to the dependents of the claimant, is inextricably involved with and wholly dependent upon the determination of the legal and factual questions of the disability of the head-of-family claimant. The dependents would receive nothing unless the head-of-family is held to be disabled and therefore eligible for benefits under the Social Security Act. It is the patent intent of the Congress to provide not only for the individual disabled head-of-family but for his dependents as well. The Fourth Circuit has held that counsel fees should be based upon "the amount of past-due benefits paid both to the disabled worker and his dependents as a consequence of the Court's judgment on the merits of the worker's claim, . . . since both the individual and his dependents gain from the lawyer's successful prosecution of the claim." See *Lambert* v. *Celebrezze*, 361 F. 2d 366 and *Redden* v. *Celebrezze*, 361 F. 2d 815, rehearing denied 370 F. 2d 373. It is most significant that the Secretary did not petition for certiorari in either case. The interpretation of Title 42 U.S.C., Sec. 406(b)(1) which the Secretary of Health, Education and

Welfare seeks in this case will result in further oppressive and economic restriction and will virtually prohibit claimants for disability benefits under the Social Security Act, as amended, from obtaining competent counsel. Certainly the tactics at the administrative level of the hearing examiners in these disability cases were criticized by the United States District Judge in his opinion in this case (see Appendix 1). There have been also numerous other cases in which these tactics have been criticized. This was commented on by the United States District Court in *Robinson* v. *Celebrezze*, 248 F. Supp. 149 (Western District South Carolina), dated September 10, 1965, as follows:

> "The statute provides a ridiculous maximum fee for compensation of counsel at the hearing level, where the determination may well shape the course of the remaining years of a tired life well spent, dedicatedly given, at the looms of industry. If the hearing examiner acts as judge, jury, prosecutor of the claimant, and advocate for the secretary; as has been the obvious and disgusting practice in the Piedmont textile region of South Carolina, the unrepresented claimant is beat before he starts . . ."

In this case a semi-illiterate claimant was confronted with governmental machinery which he neither understood nor could hope to master. Without counsel neither he nor his dependents would have received one cent in benefits under the Social Security Act.

The practical aspects of this situation are inescapable; no able and busy attorney, conscious of his need to remain financially solvent, can afford to take contingent representation of this nature if the Secretary's interpretation of

the fee statute is allowed to prevail. Additionally, by far the best method yet known to guarantee to the Social Security disability claimant the availability of skilled counsel is to provide an adequate means of compensation to skilled counsel. The Congress and many of the States have seen the need for providing the attorneys who represent indigent defendants in criminal cases the right to adequate and proper compensation. See Title 18 U.S.C., Sec. 3006A, Criminal Justice Act. The same policy question is involved in this case.

The need for adequate compensation for attorneys for claimants for Social Security system was early recognized by the First Circuit in *Gonzalez* v. *Hobby,* 213 F. 2d 68 (CA 1, 1954) at page 69 when the Court stated:

> "Certainly counsel who prosecutes such actions to review adverse decisions under the Social Security Act are entitled to receive reasonable fees for their services and the claimant for whom the services are performed should pay them. There is absolutely nothing in the pertinent section of the Social Security Act or its legislative history to indicate that Congress intended to change the policy of allowing reasonable fees for the services of attorneys who represent Social Security disability claimants."

In this instant case the United States District Court allowed to the claimant's attorney for his total fee for the representation of the Plaintiff the sum of $936.10, which represented 25% of the past-due benefits between January 1, 1963 and September 30, 1965. Additionally, the benefits during the same period for the claimant's dependent wife

were $1287.80 and for his dependent children $3463.50. The allowance of attorney fees on the basis fixed in this case constitutes approximately 11% of the total past-due benefits which accrued between January 1, 1963 and September 30, 1965. It is contended that this fee is unreasonably or "inordinately" low in view of the time and effort involved and in view of the results achieved and in view of the well-known economic facts of life affecting the legal profession. By action of the House of Delegates of the Indiana State Bar Association at its meetings October 26, 1965, and March 31, 1966, in acting upon a report of its Committee on Legal Economics recommended certain schedules relating to minimum fees as a guide to local bar associations in the State of Indiana in drafting and preparing their own fee schedules. These recommended schedules certainly represent a consensus as to what is reasonable attorney fees prevailing in the State of Indiana. The provisions of said schedule with reference to proceedings in the United States District Courts in civil cases are as follows:

1. For representing a claimant or plaintiff in a claim or action where representation on a contingent fee basis is proper

   A. 33 1/3% of amount of recovery upon settlement without trial.

   B. 40% of amount of recovery after trial.

   C. 50% of amount of recovery after appeal.

   Under the above percentages the client shall pay the expenses of litigation.

2. There are cases wherein damages are small or the legal or factual question difficult where the attorney

would be justified in charging 50% of the amount of recovery. In such cases, the expenses should be paid before any such division is made.

United States District Courts—Civil

A. General preparation for trial, including initial conferences, investigations, research, interviewing witnesses, and preparation, drafting and filing of complaint: minimum
$250.00 plus hourly charge for time spent in excess of 8 hours.

B. Same service as in "A": except for answer, third party complaint and third party answer: minimum
$200.00 plus hourly charge for time spent in excess of 7 hours.

C. Pre-trial conference: minimum $100.00

D. Attendance at docket or calendar call: minimum ..... $ 25.00

E. Trial, per diem: minimum $250.00

F. Preparation of findings, conclusions and order for judgment or decree and presentation or filing of same: minimum $100.00

G. Preparation of order for entry or default judgment: minimum ..... $ 50.00

H. Appearance to prove-up default judgment: minimum ..... $ 50.00

I. Preparation of pleadings for extraordinary remedies (in addition to above): minimum ..... $ 75.00

J. Third party practice, motions discovery and appearances should be charged at minimum rate of State Circuit Court rates plus 15% (see State Courts)

K. Hourly rate for items not otherwise covered above: minimum ..... $ 30.00 Per Hour

While the above fee schedule represents an average this Court should take judicial notice of all the proceedings in this case as shown by the relevant docket entries in the District Court. **See Appendix I, at page 1.**

The decision in this case will materially affect the availability of competent counsel in Social Security disability cases. This availability is far more important to the Social Security claimant than to the Bar.

CONCLUSION

For the above reasons the judgment and order of the United States District Court dated March 14, 1966, in this case should be reversed.

Respectfully submitted,

ALLEN SHARP
SAM W. LITZENBERGER, JR.
115 North Monroe Street
Williamsport, Indiana 47993
Attorneys for Petitioner

Of Counsel:

ISRAEL STEINGOLD
Steingold, Steingold & Schovitz
Town Point Building
Norfolk, Virginia 23514
Attorney for American Trial Lawyers Association

HAROLD H. GEARINGER
Gearinger & Vineyard
Suite 101, Professional Building
Chattanooga, Tennessee 37402

LAMPTON O. WILLIAMS
Williams & Williams
Williams Building
Box 113
Poplarville, Mississippi

November 1967

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 8 1968
JOHN F. DAVIS, CLERK

No. 276

In the Supreme Court of the United States

OCTOBER TERM, 1967

RAYMOND HOPKINS, PETTTIONER

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

ERWIN N. GRISWOLD,
Solicitor General,
EDWIN L. WEISL, Jr.,
Assistant Attorney General,
HARRIS WEINSTEIN,
Assistant to the Solicitor General,
MORTON HOLLANDER,
WILLIAM KANTER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	6
Argument	7
Section 206(b)(1) of the Social Security Act Limits an Attorney's Fee to 25 Percent of Past Benefits Due to the Claimant Himself	7
Conclusion	17

CITATIONS

Cases:

Alsobrooks v. *Gardner*, C.A. 5, No. 22,587	8
Chernock v. *Gardner*, 360 F. 2d 257	15
Gardner v. *Menendez*, 373 F. 2d 488	15
Gardner v. *Ramirez*, C.A. 5, No. 24,748	8
General Accident, Fire & Life Assur. Corp. v. *Donovan*, 251 F. 2d 961	6
Moss v. *United States*, 311 F. 2d 462, certiorari dismissed, 374 U.S. 819	6
Redden v. *Celebrezze*, 370 F. 2d 373	7, 8, 12, 15, 16
Robinson v. *Gardner*, 374 F. 2d 949	15
Sims v. *Gardner*, 378 F. 2d 70, petition for certiorari pending, No. 386 Misc., this Term	8, 9, 11, 12

Statutes:

American Japanese Evacuation Claims Act, 50 U.S.C. App. 1985	14
Social Security Act:	
Section 202, 42 U.S.C. 402	3
Section 205(g), 42 U.S.C. 405(g)	3, 12, 13
Section 206(a), 42 U.S.C. 406(a)	14
Section 206(b)(1), 79 Stat. 403, 42 U.S.C. (Supp. I) 406(b)(1)	2, 4, 5, 6, 7, 8, 10, 11, 12, 15, 16
Section 223, 42 U.S.C. 423	3

286-552—68——1

Statutes—Continued Page
Federal Tort Claims Act, 28 U.S.C. (Supp. II) 2678 14
International Claims Settlement Act of 1959, 22 U.S.C. 1623(f) 14
38 U.S.C. 784(g) 13
25 U.S.C. 70 (Indian Claims Commission) 14
Miscellaneous:
Hearings, H.R. 6675 Part 1, Senate Committee on Finance, 89th Cong., 1st Sess 10
Regulations, 20 C.F.R. 404.975–404.978, as amended, 32 Fed. Reg. 7751–7752 14
S. Rep. No. 404, Part 1, 89th Cong., 1st Sess 10
Larson, 2 *Workmen's Compensation Law* 14

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS, PETITIONER

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (A. 29–36) is reported at 374 F. 2d 726. The opinion of the district court (A. 26–28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1967 (A. 37), and a petition for rehearing *en banc* was denied on April 21, 1967. The petition for a writ of certiorari was filed on June 21, 1967, and granted on October 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the maximum fee that Section 206(b)(1) of the Social Security Act, 42 U.S.C. (Supp. I) 406(b)(1), allows a court to award an attorney who has "represented before the court" "a claimant under this subchapter" is limited to 25 percent of the total of the past-due benefits owing to the claimant himself, or may also include 25 percent of such past-due benefits as the claimant's wife and children, who are not parties to the litigation, may obtain by reason of their relationship to the claimant.

STATUTE INVOLVED

Section 206(b)(1) of the Social Security Act, 79 Stat. 403, 42 U.S.C. (Supp. I) 406(b)(1), provides:

> § 406. *Representation of claimants.*
>
> * * * * *
>
> (b)(1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

STATEMENT

Petitioner received disability payments under Section 223 of the Social Security Act, 42 U.S.C. 423, beginning as of March 1961. The benefits were terminated as of December 1962. A hearing examiner affirmed the termination, and the Appeals Council of the Department of Health, Education and Welfare denied petitioner's request for review (A. 9). Although the present record is silent on the subject, petitioner's wife and two minor children apparently had received, between March 1961 and December 1962, benefits under Section 202 of the Social Security Act as dependents of a recipient of disability payments (see A. 24).

On July 2, 1964, petitioner instituted a timely action in the United States District Court for the Northern District of Indiana, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), seeking review of the determination that he was no longer entitled to benefits (A. 5–7, 8, 30). On September 30, 1965, the district court entered an order (A. 16) reversing that determination and directing respondent "to allow and pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated."

On January 10, 1966, petitioner filed in the district court a Petition To Determine Accrued Benefits And Petition For Approval Of Agreement For At-

torney Fees (A. 17).[1] This petition requested that the court enforce a written contingent-fee agreement that petitioner and his wife had entered into with his attorney, Mr. Allen Sharp, on May 12, 1964. That agreement (A. 23) granted counsel a contingent fee of 40 percent of accrued benefits and further provided that the amount would be increased to 50 percent if appeal proved necessary. The limitations on attorney's fees established in Section 206(b)(1), *supra*, p. 2, were said not to apply because the agreement and most of Mr. Sharp's work antedated July 30, 1965, the effective date of the statute. It appeared from the computation of past-due benefits set forth in the petition that the parties sought approval of a fee of 40 percent of the total of the past-due benefits payable to petitioner, his wife, and their two children.

On March 14, 1966, the district court entered an order awarding Mr. Sharp a fee of 25 percent of the past-due benefits payable to petitioner[2] (A. 26–28). The court declined to enforce the agreement for employment, holding that the limitations of Section 206 (b)(1) of the Social Security Act overrode the agreement.

Petitioner appealed, raising only the question of the proper attorney's fee. He contended that even if the statute applied to this case the fee under Section 206 (b)(1) should have been measured by the benefits due

[1] In the interim, respondent had noticed, and then voluntarily dismissed, an appeal.

[2] Such benefits amounted to $3,744.80, resulting in an attorney's fee of $936.20.

his wife and children as well as those due petitioner himself.[3]

The court of appeals affirmed the fee award of the district court (A. 29–36). It held that Section 206(b)(1) was controlling,[4] that the maximum permissible fee was 25 percent of past-due disability benefits due petitioner, and that past-due benefits payable to his wife and children—whose benefit payments had been resumed without litigation (A. 24–25)—were not chargeable with any attorney's fees.[5]

---

[3] Past-due benefits payable to petitioner's dependents amounted to $4,752.10 (A. 24), so that a fee of 25 percent of accrued benefits payable to petitioner and his dependents would be $2,124.02.

[4] Petitioner does not reassert here his contention below that the contingent fee contract, rather than Section 206(b)(1), controls.

[5] The procedural situation is somewhat unusual. Raymond Hopkins, the social security claimant is the petitioner in this Court, and the Secretary of Health, Education, and Welfare is the respondent. Yet, the conflicting financial interests are those of petitioner and Allen Sharp, his lawyer. Mr. Sharp appears here as counsel for the petitioner, although he is really representing himself. Counsel for the Secretary of Health, Education, and Welfare, though nominally appearing for him as respondent, are, in substance, advancing arguments that inure to the benefit of the petitioner, Raymond Hopkins.

In our view, any seeming lack of controversy is purely formal. The basic case in the United States District Court for the Northern District of Indiana was brought by Raymond Hopkins against the Secretary of Health, Education, and Welfare. The present case arises out of a collateral application appropriately made in connection with that case. The case has been conventionally entitled in the same way as the main case in the District Court, but the essential nature of the controversy here is clear. Although the respondent Secretary of Health, Education, and Welfare appears to be on the same side of the case as the petitioner, he is in substance appearing to maintain the

SUMMARY OF ARGUMENT

The sole question in this case is the proper determination of the maximum fee that Section 206(b)(1) of the Social Security Act allowed the district court to award counsel for his successful representation of petitioner in securing reversal of respondent's discontinuance of petitioner's disability payments. The statute requires that the fee not exceed "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." The word "claimant" refers only to the plaintiff. The plaintiff is the only person on whose behalf the court renders judgment, whom the attorney has "represented before the court" and who becomes "entitled" to money by reason of the court's judgment. Therefore, the court below correctly decided that the maximum fee is to be measured by the past benefits due the claimant himself, and may not include amounts attributable to benefits that the claimant's dependents may receive as a result of the court judgment together with proof that they satisfy the other statutory requirements of age and relationship to the claimant.

---

integrity of the system which he is charged to administer as against the appropriately presented claim of the petitioner's lawyer. Comparable appearances have been made, for example, in cases involving fees for representing claimants under government life insurance policies. *E.g.*, *Moss* v. *United States*, 311 F. 2d 462 (C.A. 2), certiorari dismissed, 374 U.S. 819; cf. *General Accident Fire & Life Assur. Corp.* v. *Donovan*, 251 F. 2d 961 (C.A. D.C.).

This result accords with the congressional purpose of limiting attorneys' fees, and thereby maximizing benefits to claimants. It is notable that Congress, in this unambiguous statute, did not provide that attorneys' fees may rest on past amounts due dependents who do not and need not litigate their derivative claims. Congress could hardly have intended to provide a larger fee for the married claimant who receives the same legal services as the single claimant. Moreover, the result below provides a maximum fee that is fair and in keeping with fee limitations established in other legislation.

The Fourth Circuit's express rejection (see *Redden* v. *Celebrezze,* 370 F. 2d 373) of a "literal interpretation" of the statute is seemingly based upon the view that it would be sound policy to follow a more flexible standard. We submit that the statute provides no basis for such a reading, and that the effect of the Fourth Circuit's approach is to substitute that court's preference for the policy that the Congress adopted.

ARGUMENT

SECTION 206(B)(1) OF THE SOCIAL SECURITY ACT LIMITS AN ATTORNEY'S FEE TO 25 PERCENT OF PAST BENEFITS DUE TO THE CLAIMANT HIMSELF

1. The sole question in this case is the determination of the maximum fee that Section 206(b)(1) of the Social Security Act allowed the district court to award the attorney, Mr. Sharp, for his successful representation of petitioner in this case. The statute requires that the fee not exceed "25 percent of the total of the past-due benefits to which the claimant

is entitled by reason of such judgment * * *." The key word is "claimant." Does it refer, as the court below and the Sixth Circuit[6] have held, only to the person who successfully appears before the court as plaintiff? Or does it, as the Fourth Circuit has ruled,[7] include others who, because of a dependency relationship, may claim benefits derivative from and contingent upon the plaintiff's.

The word "claimant" appears twice in Section 206(b)(1)—each time in the first sentence. The context of the initial reference gives a clear definition of the term. The language is: "Whenever a court renders a judgment favorable to a claimant under this sub-chapter who was represented before the court by an attorney * * *." This clause describes three characteristics of the "claimant": he is the person on whose behalf the court rendered judgment, the one who was "before the court" and the one whom the attorney seeking a fee has "represented before the court."

Only a plaintiff can satisfy such a description; a non-party cannot. The plaintiff's dependents, if they are not joined as parties, are not before the court, have not received a judgment, and have not been represented in court.

---

[6] *Sims* v. *Gardner*, 378 F. 2d 70, petition for certiorari pending, No. 386 Misc., this Term.

[7] *Redden* v. *Celebrezze*, 370 F. 2d 373 (C.A. 4). The Fifth Circuit in one case, *Alsobrooks* v. *Gardner*, C.A. 5, No. 22,587, petition for rehearing pending, awarded an attorney a fee of 25 percent of the past benefits due a claimant and his dependents. The court deferred to another pending case, *Gardner* v. *Ramirez*, C.A. 5, No. 24,748, the question of the proper meaning of Section 206(b)(1).

The second use of the word "claimant" is in the clause that sets a limit to the attorney's fees the court may award. This limit is measured by "the past-due benefits to which the claimant is entitled by reason of such judgment * * *." The essential word of this clause is "entitled." In legal usage one is "entitled" to money only if he has an absolute and unqualified right to it. Only the plaintiff becomes "entitled" to money "by reason of such judgment." Moreover, it is clear that "such judgment" refers to "a judgment favorable to a claimant." The only judgment rendered in this case provided for payments "to the plaintiff." (A. 3, 16.) It is true that a possible consequence of such a judgment is the payment of past-due benefits to the plaintiff's dependents. But the judgment by itself does not create the right to the money. It is but one of three essential factual elements of the dependents' right to money. "This judgment is certainly helpful in paving the way for the payment of benefits to the dependents, but the dependents must still satisfy the Secretary as to their relationship to the insured and other statutory requirements. 42 U.S.C. § 402(b)–(h)." *Sims* v. *Gardner, supra,* at p. 72. Because the dependents cannot receive money unless they prove these additional requirements of relationship and age, they cannot become "entitled" to their money "by reason of such judgment."

Petitioner was the only party plaintiff in this case. He, but not his wife and children, appeared before the court. He alone was there represented by Mr. Sharp. It is true, as the record shows (A. 24–25),

that the past benefits due to his wife and children were paid at the same time as petitioner's. But petitioner's judgment was not the only reason for this resumption; respondent also had to be satisfied that Mrs. Hopkins and the children had the requisite relationship to petitioner and were of the requisite ages—facts which, in this particular case, had been established earlier. Neither Mrs. Hopkins nor the Hopkins' children could be a "claimant" to whom Section 206(b)(1) refers.

2. This result is in accord with the legislative purpose underlying Section 206(b) and the general scheme of the Social Security Act. Section 206(b) was added to the Act in 1965 at the request of the Secretary of Health, Education and Welfare. The Secretary's overriding purpose in proposing the legislation was to protect Social Security Act claimants from unduly large fees that some attorneys had been charging under contingent fee agreements. Hearings, H.R. 6675, Part 1, Senate Committee on Finance, 89th Cong., 1st Sess., at p. 513. In accepting the Secretary's proposed amendment, the Senate Finance Committee explained the purpose of the provision as follows (S. Rep. No. 404, Part 1, 89th Cong., 1st Sess., at p. 122):

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinantly large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the

> attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.
>
> The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 per cent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. * * *

This concern with restricting attorney's fees reflects, of course, the overall purposes of the Social Security Act—to provide maximum benefits to persons having substantial needs. As the Sixth Circuit observed in *Sims* v. *Gardner, supra,* at p. 72, "[a]ttorneys' fees in this area * * * cannot be viewed in a vacuum, but must be examined in relation to the needs of the claimants." Congress obviously recognized that the larger an attorney's fee is, the lesser is the benefit to a person in need. Its objective was to limit the fee and enlarge the benefit.

Congress was undoubtedly aware that some claimants of Social Security benefits have beneficiaries who may receive benefits as the result of the claimant's success in court, if they show the proper additional qualifications. And Congress must have been equally aware of the fact that the principal claimant, and none of his dependents, is the party who usually has a justiciable controversy with the Secre-

tary, so that the dependents would not ordinarily have the standing to appear as plaintiffs on their own behalf.[8] Congress could readily have provided, had it chosen, that the attorney's fees may rest on past amounts due to those not before the court and who need not pursue litigation to secure their derivative benefits. The absence of any reference in Section 206 (b)(1) to dependents' benefits justifies only one inference—that the limit Congress sought to place on attorney's fees is to be measured only by the past benefits due the claimant, and not by those his dependents receive.

It would, in addition, be anomalous if the maximum fee were to fluctuate fortuitiously, depending on whether the applicant has a wife or children who are of the proper age to qualify for dependency benefits. Congress made clear its concern with the fact that fees under the contingent arrangements in use before 1965 varied more with the lapse of time for which past

---

[8] We disagree with the Fourth Circuit's suggestion in *Redden* that our reading of the statute is subject to "universal avoidance" by resort to the simple expedient of joining claimant's dependents as coplaintiffs. The Sixth Circuit correctly concluded in *Sims* (378 F. 2d at 72):

> [O]nly if the attorney is required to raise in the district court such issues as the relationship of a dependent to the insured should the dependent's benefits be considered "benefits to which the claimant is entitled by reason of" the judgment of the court.

Although, as the Fourth Circuit noted, Section 205(b) allows a dependent to be heard on the merits of the claimant's application for payments, and the dependent, through Section 205(g), may appeal to the courts from a denial of such an application, such an appeal does not deal with such rights as the dependent might have.

benefits accrued than with the legal services rendered (see p. 10–11, *supra*). The presence or absence of dependents has even less influence on the nature and quality of the lawyer's services than does the lapse of time. As the court below suggested, it is most unlikely that Congress intended that in a case like this "the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single." (A. 36.)

3. Nor does the result below place such a low limit on fees as to suggest that Congress had something higher in mind. The fee is—as Congress must have known—for representation in proceedings that are, by statute, summary in nature. There is neither discovery nor an evidentiary hearing. The record is the one already adduced in administrative proceedings. Disposition is necessarily on motion for summary judgment. See Section 205(g) of the Act, 42 U.S.C. 405(g). Experience shows that the fees have not been insubstantial.[9] These factors all militate in favor of the literal reading of the statute we urge here—one that would nonetheless be as or more generous than fees allowed under other comparable statutes.[10]

---

[9] Respondent's records disclose 292 cases in which the courts have allowed fees under section 206(b)(1), using as the base past benefits due to only the claimant. In 36 cases, about 12 per cent of the total, the fee has been under $500; in 133, or about 46 per cent, of the cases, the fee has been between $500 and $999; 90, or slightly less than a third, of the cases, the fee has been between $1000 and $1499. The remaining fees have been $1500 or more.

[10] See 38 U.S.C. 784(g) (soldier's or veterans government life insurance policies, or United States government life insurance;

This is not to say that an attorney may not secure a fee based upon past benefits due a claimant's dependents. Such a dependent must apply for benefits; they do not flow merely from the approval of the husband's own application. If the Secretary agrees that the dependent qualifies, the dependent has no controversy with the Secretary. In such a case the dependent would need an attorney at most to prepare and file the appropriate documents. If the Secretary disputes either the claim of dependency or the dependent's age, there may well be need for more substantial legal representation in administrative hearings. Whatever services he renders a dependent, the attorney may apply to the Secretary for an attorney's fee for services in administrative proceedings based on the value of the actual services rendered, see 20 C.F.R. §§ 404.975–404.978, as amended, 32 Fed. Reg. 7751–7752 [11] a fee that only the Secretary may

---

10 percent maximum attorneys' fees); International Claims Settlement Act of 1959, 22 U.S.C. 1623(f) (10 percent maximum); American-Japanese Evacuation Claims Act, 50 U.S.C. App. 1985 (10 percent maximum); 25 U.S.C. 70 (Indian Claims Commission) (10 percent maximum); 28 U.S.C. (Supp. II) 2678 (Federal Tort Claims Act; maximum for court representation recently raised from 20 to 25 percent). In New York attorneys' fees in Workmen's Compensation cases have in the past averaged 4.5 percent, see Larson, 2 *Workmen's Compensation Law*, § 83.15, p. 348, and several Workmen's Compensation statutes set a maximum rate ranging from 10 to 25 percent, *id.* at 347, 560–561.

[11] No basis is advanced, and we perceive none, for petitioner's claim (Brief 5–6) that the cited regulations are invalid. Section 206(a) of the Act, 42 U.S.C. 406(a), expressly allows the Secretary to "prescribe the maximum fees which may be charged for [legal] services performed in connection with any claim before the Secretary under this subchapter * * *."

award.[12] And if judicial proceedings are required, he may of course receive a fee pursuant to Section 206(b)(1) of the Act.

On the other hand, to allow the dependent's benefits to form the basis for an attorney's fee for representing only the principal beneficiary would compensate the attorney for services he has not rendered. More than this, it would substantially inhibit the representation of dependents who do have separate controversies with the Secretary. For, were such a measure of fees allowed, the benefits available to the dependents, and therefore the potential fee for any attorney who so represented them, would be lessened.

4. The Fourth Circuit majority, in ruling that the maximum attorney's fee is 25 percent of the combined past-due benefits of the plaintiff and his dependents, did not rest its conclusion on an analysis of the statutory language. On the contrary, it recognized that the "literal interpretation * * * would limit the fee basis to the accrued benefits payable to the claimant on his own behalf, excluding entirely the benefits payable on the claims of dependents." 370 F. 2d at 374.

It based its rejection of the plain meaning of Section 206(b)(1) on its view that the dependents' benefits "inure to the benefit of the husband substantially to the same extent as if they were paid directly to him." 370 F. 2d at 375. We agree that dependents' benefits "inure" to the benefit of the head of the

[12] *Gardner* v. *Menendez*, 373 F. 2d 488 (C.A. 1); *Robinson* v. *Gardner*, 374 F. 2d 949 (C.A. 4). See, also, *Chernock* v. *Gardner*, 360 F. 2d 257 (C.A. 3).

family. That is a natural consequence of a dependency relationship. But this is hardly a justification for rejecting the "literal" reading of the statute in order to expand the base for the attorney's fee—as the Fourth Circuit did (370 F. 2d at 376)—by "adoption of the construction which gives the larger limitation * * *." Congress was as aware as the courts of the economic benefits that payments to dependents confer upon a social security claimant. It chose to limit the fee to 25 percent to the past-due benefits to which the claimant becomes "entitled by reason of such judgment." Contrary to this legislative mandate, the Fourth Circuit expressly recognized that it was adopting a rule that allowed attorneys' fees based on amounts in addition to those encompassed within the statutory language.[13] We submit that this is an unwarranted departure from the statutory language and scheme.[14]

---

[13] The court said, "We assume, of course, the absence of any question that the children listed by Redden are his and are dependents." 370 F. 2d 375, n. 3.

[14] In addition, respondent's records show that the district courts have not followed the suggestion of the Fourth Circuit (370 F. 2d at 376) that a fee of the maximum of 25 per cent be the exception rather than the rule. Those records show 26 cases in which district courts, purporting to apply section 206(b)(1), have based a fee on the combined past benefits due the claimant and his beneficiaries. In 18 the fee was set at 25 per cent of the combined benefits; in the others the fee exceeded 15 per cent.

Of the 292 cases that have applied section 206(b)(1) in the manner we urge (see footnote 9 *supra*), the fees in 239 were set at 25 per cent of the past benefits due the claimant; 42 others were above 15 per cent, and only 5 were under 10 per cent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
HARRIS WEINSTEIN,
Assistant to the Solicitor General.
MORTON HOLLANDER,
WILLIAM KANTER,
Attorneys.

JANUARY 1968.

U. S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

No. 276.—October Term, 1967.

Raymond Hopkins, Petitioner, *v.* Wilbur J. Cohen, Acting Secretary of Health, Education, and Welfare.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 2, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

The question is whether the ceiling on an attorney's fee under § 206 (b)(1) of the Social Security Act, as amended,[1] 42 U. S. C. § 406 (b)(1), is based on the benefits received by the claimant alone or may be based also on the benefits that other dependent members of his family receive by virtue of the claimant's disability.

Respondent ruled that petitioner[2] was not totally and permanently disabled within the meaning of the Act. The District Court reversed and awarded the claimant's

[1] Section 206 (b)(1) presently provides:

"Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405 (i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph."

[2] "Petitioner," as used in this opinion, refers to Raymond Hopkins, the Social Security claimant. The interest involved in the case, as it reaches this Court on the issue of the proper amount of the attorney's fee, is, however, that of Hopkin's attorney, Allen Sharp.

attorney a fee equal to 25% of the benefits accruing to the claimant alone. The Court of Appeals for the Seventh Circuit affirmed. 374 F. 2d 726. Because its ruling as to attorney fees conflicted with decisions of the Fourth Circuit (see *Redden* v. *Celebrezze*, 361 F. 2d 815; *Lambert* v. *Celebrezze*, 361 F. 2d 677), we granted the petition for certiorari. 389 U. S. 811.

The disabled claimant qualifies under § 223 of the Act (42 U. S. C. § 423) and figures his primary benefits under § 215 of the Act (42 U. S. C. § 415).

The claimants who receive benefits as relatives of the disabled person who qualifies under § 223, figure their eligibility and amount of benefits under § 202 of the Act (42 U. S. C. § 402; wife, § 202 (b); child, § 202 (d); widow, § 202 (e); widower, § 202 (f); mother, § 202 (g); parent, § 202 (h)).

Section 202 of the Act describes in (b)(1) and (b)(2) the benefits payable to the wife on the disability of the husband, and in (d) (1) and (d) (2) the disability benefits of the child of the disabled husband. The wife (§ 202(b)(1)(A)) and the child (§ 202 (d)(1)(A)) may file for these benefits. But they need not always do so themselves,[3] for the Act makes the right to such benefits dependent primarily on the status and condition of those dependent persons.

The wife and child each compute their benefits on the basis of a percentage share of the disabled husband's primary benefits determined under § 223. See §§ 202 (b)(2)[4] and 202 (d)(2). The maximum family benefit

[3] See 20 CFR §§ 404.603–404.604. Nor are the wife and children required to become parties to proceedings on review of an administrative determination. See 42 U. S. C. § 405 (b) and (g); and 20 CFR §§ 404.909–404.910; 404.916–404.919; 404.945; 404.951.

[4] The Social Security Act Amendments of 1967 changed former § 202 (b) to read:

"Except as provided in subsection (q), such wife's insurance benefit for each month shall be equal to whichever of the following is

depends upon the amount of the primary benefit to which the disabled husband is entitled. See §§ 215 (a) and 203 (a). The scheme of the Act thus proceeds from a recognition of an intimate relationship between the varying amounts of benefits due the disabled claimant and his dependents.

Hopkins was receiving disability payments under § 223 between March 1961 and December 1962; his wife and two children were also receiving benefits during this same period as dependents of a recipient of disability payments (§ 202). In December 1962, these benefits were terminated, on the ground that petitioner was no longer "disabled" within the meaning of the Act. Petitioner exhausted his administrative remedies, and then sought review in the District Court. The District Court's order reversed the administrative decision as to disability. And pursuant to this order the Director of the Bureau of Disability Insurance wrote petitioner as follows:

> "Based on the recent amendments to the Social Security Act, you are entitled to receive $123.10. Your wife and the two children are each entitled to receive $51.50. These new monthly rates are effective beginning January 1965.
>
> "Section 206 (b)(1) of the Social Security Act provides that our attorney may ask the court to approve a fee not to exceed 25 percent of past-benefits due you. We are, therefore, withholding the amount of $936.20, which represents 25 percent of your past-due benefits of $3,744.00 pending action by the court on the amount of the attorney fee. The amount withheld will be applied against the fee

---

the smaller: (A) one-half of the primary insurance amount of her husband (or, in the case of a divorced wife, her former husband) for such month, or (B) $105." Pub. L. No. 90-248, § 103 (Jan. 2, 1968).

set by the court and will be mailed directly to your attorney; any remaining amount will be sent to you.

"Benefit payments for you and your wife will continue to be combined. The next husband-wife check will be for $5,032.60. This represents payment for January 1963 through December 1965. You will receive this check within a few days. After that, the monthly check for $174.60 will be sent shortly after the month for which it is payable.

"The children's check for the period of January 1963 through December 1963, [sic], in an amount of $3,463.50, will be sent to you shortly. After that, their monthly, regular check for $103.00 will be sent to you as usual."

Section 206 (b)(1), restricting the amount of an attorney's fee, speaks of "the past-due benefits to which the claimant is entitled." Respondent argues that only a plaintiff can satisfy such a description, not a nonparty. It is also urged that dependents who are not joined as parties have not received a judgment and that the benefits accruing to the wife and the children are not benefits to which the husband, the only claimant, is "entitled" within the meaning of § 206 (b)(1).

That seems to us to be too technical a construction of the Act which we need not adopt. In this instance, proof of the husband's "claim" [5] results in a package of

[5] The record reveals that petitioner applied for benefits for his two children in his initial application for disability payments. Although that application did not encompass a claim for benefits on behalf of his wife, it is made clear in the application that his wife was also applying for benefits. It does not appear, however, whether the separate application for wife's benefits was filed by her or by petitioner on her behalf. See n. 3, *supra*. No question is raised concerning the propriety of the claims that were filed. Nor is this a case where any question has been raised concerning the right of the wife or children to benefits. Rather, the wife and children had been receiving them as dependents of a disabled person until they

benefits to his immediate family; and those benefits inure to the benefit of the head of the family who files the "claim."

The legislative history of § 206 (b)(1) speaks of the desire of Congress to reduce "contingent fee" arrangements and to restrict an attorney's fee to an amount "not in excess of 25 per cent of accrued benefits."[6] We find nothing in the history of § 206 (b)(1) that would likewise restrict those "accrued benefits" to amounts owed the husband, as distinguished from his dependents, *viz.* the wife and the children.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

---

were terminated by respondent's erroneous decision that the husband was no longer disabled. When that decision was reversed by the District Court, the only impediment standing in the way of the receipt of past-due benefits by the wife and children was removed. In a realistic sense, then, the attorney was representing fully the interests of the wife and children when he litigated the question of the husband's disability.

[6] S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess., p. 122.

"It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinantly large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

"The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 per cent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. . . ."

SUPREME COURT OF THE UNITED STATES

No. 276.—October Term, 1967.

Raymond Hopkins, Petitioner,
v.
Wilbur J. Cohen, Acting Secretary of Health, Education, and Welfare.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 2, 1968.]

Mr. Justice White, with whom The Chief Justice and Mr. Justice Brennan join, dissenting.

As the Court recognizes, § 206 (b)(1) entitles the attorney of a Social Security benefits claimant to a fee "not in excess of 25 percent of the total of the past-due benefits to which the *claimant* is entitled by reason of such judgment . . . ." (Emphasis added.) The Court characterizes the normal and natural reading of this language as "too technical a construction . . . which we need not adopt." From the undisputed fact that benefits accruing to the dependents of a claimant inure to the benefit of the claimant as head of the family, the Court seems to conclude that it may read "claimant" to mean "claimant and his dependents." Because I see no justification for this result, either in the language of the statute or its history, I dissent.

Section 206 (b)(1) deals with the attorney's fees payable with respect to "a claimant under this subchapter who was represented before the court by an attorney . . . ." The attorney may receive no more than 25% of the benefits payable to such a claimant "by reason of such judgment . . . ." Only plaintiffs can meet the § 206 (b)(1) definition of a "claimant." Therefore, dependents who are not joined as parties in a suit for

past-due benefits are not "claimants," for they are not before the court, are not represented in court, and do not receive a judgment. In this case only petitioner, and not his wife and children, were plaintiffs in the court below. As is true in most such cases, petitioner's wife and children were determined in separate administrative proceedings to be dependents eligible for secondary benefits under § 202. Their entitlement to § 202 benefits should petitioner be found entitled to benefits under § 223 was not disputed and was not an issue before the court below. Since petitioner was the sole claimant before the court, and the only party for whom his lawyer provided representation in that court, I cannot escape the conclusion that the lawyer was entitled only to a maximum of 25% of the past-due benefits payable to petitioner. The situation might well be different in a case where the dependents were active plaintiffs before the court and where the primary claimant's attorney provided effective representation for the secondary claimants as well.

As the Court makes clear, the purpose of § 206 (b)(1) was to reduce contingent fee arrangements by limiting the maximum fees recoverable by attorneys. The Court somehow concludes that this clear legislative purpose militates for a construction of the statute which is against its clear wording and which has the result of once again permitting attorneys to obtain a very high percentage of the benefits payable to Social Security claimants. The legislative history, however, supports the plain language of the statute. Indeed, the Court fails to mention that this very case was generated initially by a claim made by petitioner's lawyer that a contingent fee contract signed by petitioner, which would have given his lawyer 40% of the award, should be given effect because entered into prior to the passage of § 206 (b)(1). It

was just such contingent fees that Congress meant to prohibit. By its present ruling the Court gives mere lipservice to the legislative mandate while effectively undoing it in practice. For the foregoing reasons I respectfully dissent.